

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

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2005 HOUSE JUDICIARY

HB 1509

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1509

House Judiciary Committee

Conference Committee

Hearing Date 2/1/05

Tape Number	Side A	Side B	Meter #
1		xx	15.2-end
2	xx		0-44
Committee Clerk Signature <i>Aaron Penrose</i>			

Minutes: 13 members present, 1 member absent (Rep. Zaiser).

**Representative Maragos:** We will open the hearing on HB 1509.

**Rep. Jim Kasper:** I have a three ring binder for each committee member, which is going to give you a lot of technical information and legal facts that is not germane at this time in the presentation, but will be referring to some federal statutes and some problems in federal law pertaining to my bill and have given you the background for your review once my presentation is completed. This bill is based on the movie, "Field of Dream". The movie was about a farmer in Iowa, where someone hoped to have baseball players come to Iowa if he built a baseball field in the cornfield. This bill is a field of dreams bill because I am suggesting that we pass legislation, which is enabling legislation, and if we pass it, they might come. That is the hope of this bill. It is an economic development bill, as I will explain as I go through my testimony. It is a bill that will look to bring companies currently that are not in the US into ND. We spend a lot of our time in this legislative body, working on economic development, where we try to bring new

companies to ND, how can we give incentives out of the dollars of our state coffers to build businesses. Some come and some succeed. We try to help businesses in our state, to help them expand their business opportunity. We struggle with revenue, we struggle with jobs, we struggle with opportunities for our people. HB 1549 (believe it should have been 1509 that Rep. Kasper was referring to) has the potential, in my opinion, to generate \$500 million dollars of new revenue per year to the state of ND. I grew up in Beulah, and on Sundays, we would go to Stanton (in the '50s). We sat around the table and played poker. We played for nickels, dimes and quarters. The idea was that we could play with the big boys and if we made any money, we got to keep the money, and when we ran out the \$5, we were out of the game. So my interest in the game of poker goes back to when I was a kid. I enjoyed the game, the challenge, the skill involved in that game. I hadn't played poker for 20-25 years, when two years ago I was watching TV and saw something about the Internet and the game of Texas Hold 'Em, where an individual named Chris Moneymaker, was playing in the world series of poker, he won the event. There were 800-900 players in the game. He qualified for this world series of poker on the Internet. It cost him a total of \$40 to qualify for this big event that he won \$2.5 million dollars, because of his skill to qualify. I said to myself, that looks like an interesting game. We have a lake home in Minnesota, they have an Indian casino. I walked into the casino and they had a poker room. I tried my hand at the game. I didn't do very well to begin with, it's a very skillful game. The chance in the game is the cards that are dealt to you, and the cards that are turned over. But the skill in the game, is what you do with what you're given. That determines whether you win or lose, or break even. I began to play in those events and they would have tournaments every weekend. A registration fee of \$20 for the tournament was required and you would be able to

participate in the tournament. You would receive chips and the idea is to win all the chips. The number of players varies during each tournament. When your chips are gone, you're out of the tournament. Entry fees range from free to \$5 or up to the World Series poker, which is a \$10,000 buy in. In reading the magazine, "Card Player", that you can play on the Internet. I began to look at these sites. Under current law, in the US back in 1961, the federal government passed the Federal Wire Act. The Federal Wire Act says that it is illegal to gamble over the wire. In 1961, it was the telephone. The idea was that they wanted to stop money laundering and illegal betting on the horses, dogs, etc. Since that period of time, as the Internet came on board in the early '90s and the interactive opportunity to play games of skill and chance on the Internet, the companies that began to host these Internet, live poker sites, decided to go offshore. The reason they went offshore, 1) they were fearful of the wire act, that the federal government or the FTC or FCC could attempt to say that this illegal gaming; 2) that no state in the United States has passed enabling legislation to license and regulate Internet like action poker sites. HB 1509 will license and regulate Internet poker sites, if they locate to the state of ND. Why is that important to our state. Why would the companies want to come, if we pass it they may come. The biggest fear the Internet poker site has, is that the players who are on that live action site will think or feel that their computer program is fixed, or not legal, or set up so that money is going to be scammed or stolen from the players. If people don't play on your poker site, no revenues will flow to the poker site itself. The players have the biggest concern also, that if we play for fun and you can play for play money, chips, or dollar amounts, is am I getting a fair and honest computer program on this poker site. These poker sites number between 200-300. All are located offshore, some are located in the Ontario Canadian wilderness, in the Indian reservation, the Manatowak Indian

Reservation, which is where they have a safe haven for them to have the sites. The poker sites want to be licensed and regulated in the US. They have tried over the last 6-7 years to get state legislators to pass enabling legislation, and have been unsuccessful. I visited with a couple of owners of the poker sites and asked them what it would take for them to locate to ND. They said 1) they want fair taxation, which is quite fair in the bill; 2) need broad band Internet access, the state of ND is one of the best wired states in the US, with our capacity; and 3) they want oversight and regulation, so that they can promote to the rest of the world that they are licensed and regulated under the state of ND and the Attorney General has the authority over our site. So they and their players can rest assured that there is an honest game going on. We would license and regulate these poker sites, if they come to our state.

**(A live demonstration was given on the Internet, the site was partypoker.com).**

On this site, there are 3,517 tables active on this site. There are 26,835 players playing right now. You multiply this by 200-300 sites, you can see the magnitude of the number of players that are playing this game. It is estimated that between 50-75 million people in the US are playing Internet poker at some point in time during the week. If I wanted to play this game, I would click on seat open and you would see the stakes on this game. It is \$5 to buy in and \$1 entry fee. The house takes the \$1 entry fee. So on this game of poker, the house will take \$10 and the players' pool is \$50. The players will divide the \$5. First place will earn \$25, 2nd place, \$15, 3rd place, \$10 and the other seven lose their \$5 plus their \$1. Everyone starts out with chips. Everyone starts out with \$800 in chips, play money. The idea is that at the end of the game you want \$8,000 worth of chips, and you win the game. The cards are being dealt and they are hidden.

These players can be from all over the world. At the end a couple of people will be standing.

The game will be over when the last person wins all the chips.

**Representative Meyer:** Are you currently playing.

**Rep. Jim Kasper:** No, if I were playing, you would see my screen name at a chair, and my two cards would appear on the screen. You see your cards only. The only time you see any other cards, is when there is a showdown. (presentation finished). I would like to explain the bill.

The first thing is relating to the licensing and regulating of Internet live action poker, and wanting these entities to come to our state. Section 1, this is out of the Constitution. There is a definition of gambling, which is found on page 1, line 8-11 of the bill. I submit to you the demonstration that we just saw, if you were playing, do you think you had control over what was going on. I think you would have to agree you did. You have control over the site, the table, the wager, whether you call the bet or fold, whether or not you continued on to the end of the hand. You contrast that to the typical slot machine gaming. You sit down in front of a slot machine and put in a nickel, dime or quarter, press the button; how much control do we have over a slot machine. We have none, no control. I submit that poker is much different than the typical gambling. You contrast that to horse or dog racing. We have no knowledge of the outcome of that event unless they are fixed. Of course, who knows whether they are or not. In poker, when you are making your own decisions, you have the right to play or not, call, hold, whatever. When you look at (a) on line 11, gambling does not include, on line 13, lawful contests of skill, including Internet live poker. I'm redefining poker. I'm stating in the bill that this is no longer gambling under ND Constitution. I met with the AG and he has a little heartburn over that statement. I'd like to keep that statement in the bill; however, because I do have a companion

Concurrent Resolution that would require a vote of the people in 2006 to amend our Constitution to allow Internet live poker. I'm covering both sides of the net. I submit that we redefine Internet live poker, as not gambling, but a game of skill. I've got information in the handout that you can peruse at your leisure. Section 2, we're talking about adjusted gross proceeds, and why that is important. Because the means of revenue to the state of ND, comes from how we tax these poker entities. They would come to our state, they would locate here, their employees would be here, the site would be located here, and of course, we license and regulate them, and we will tax them for that. We talk about adjusted gross proceeds, on the top of page 2, under Internet live poker, we define what that is. You saw what the game is. We do enable poker games, such as Texas Hold 'Em on line 5, etc. to be played on the site. We're restricting it to poker games only. Number 3, line 8, "licensed Internet live poker establishment" will mean premises licensed by the AG, pursuant to this chapter, to conduct games of Internet live poker. On line 10, Internet live poker authorized: they are authorized and may be operated by a licensed Internet live poker establishment in accordance with the chapter. The AG shall license and regulate the playing Internet live poker at licensed Internet live poker establishments in the state. There can't be any games played, that they are going to locate their servers in California and try to take advantage of ND law. We want them to be here, we want the jobs created in our state because of it. Going to line 15 and 16, the tax. First of all, when visiting with the AG and trying to soften the fiscal note. I saw a fiscal note dated 1/18. I hope there is a different one, because I don't believe that this is going to cost the state or the AG anything unless the people come, and if they come, we are going to make a lot of money, as I'll show you in the numbers. On line 16, I say the AG may contract with a private entity for the development and implementation of a

program for the licensing and regulation of Internet poker. The AG has the choice, they do it inside their own office, or if the poker sites wish to come to our state, they can contract with another entity to provide the oversight, the licensing, regulation and checking of these establishments. It is up to the AG. There would be no money spent unless these poker sites start coming. If they come, there is going to be a lot of revenue generated. So if the fiscal note is \$900,000, I submit to you the millions that will come to our state because of this industry locating to our state, is way over and above the cost it is to implement this law. You can see that in going down to line 18, the program must include a license fee for each player that operates an Internet live poker site, and an annual licensing fee of \$10 for each player who plays Internet live poker at a site. With 200-300 Internet poker sites that are out there offshore. Let's say 200 of them came to our state. The revenue stream, as you can see down from line 22-30, I think would average between \$150-250,000/year per poker site that comes to our state. Let's say \$200,000 times 200 is \$40 million dollars. A fiscal note of \$900,000 compared to \$40 million, I'll take the \$40 million. That's not where the big money comes in. The poker players that are on the Internet, are fearful that the program would be fixed and illegitimate. With our oversight, we eliminate that. Because we provide the players of the US, and of the world, that guarantee, my bill would require a \$10 licensing fee per player per year, collected by the poker sites. As you saw when I logged in, if I were to open a money account with that poker site, I would deposit into that poker site the funds I wished. Let's say I deposited some funds into my account. On that initial deposit, the live poker site would extract \$10 and they would verify that the person is of legal age to play (I suggest 18). The site would take the \$10 out and deposit it with the general fund. With 50 million players x \$10 licensing fee per year, is \$500 million dollars of licensing

fees per year. Now why would a player pay \$10, because they are being assured that the program is legitimate and they aren't going to be scammed by these poker sites. How much economic development money and how many businesses do we have to bring to ND to create an additional stream of revenue to the state of ND of half a billion dollars per year. Our whole budget in general fund revenues is about \$1.2 billion, per biennium of state dollars. This could potentially match the whole revenue stream that our state collects right now. There is no state in the US that has stepped forward and no legislature that has the courage to enact enabling legislation, if we build it, they might come. If they come, the potential revenue stream to the people of our state is dramatic. If you look at lines 23-30, I added those percentages up. I wanted to make the tax on the poker sites very fair. Line 24, the tax proposed in the bill, would be 8% of the first million dollars, \$80,000; 6% of the second million, that's \$60,000; 4% on the third million, that's \$40,000; 2% on the next five million, that's \$100,000; and ½ % on the next fifty million, that's \$250,000; and ¼ of 1% of all the revenues in excess of \$58 million dollars. If that were \$158 million, that would equal a tax on this poker site alone of \$780,000/yr to the state of ND on the regulation, plus the licensing fee that we collect from the people who play. The poker site that was demonstrated earlier, partypoker.com, is the largest site that we know of. It's estimated by good authority, that the site takes in about \$100,000-200,000 per hour in gross revenues. If it were \$100,000 per hour, that's \$2.4 million per day, and if it's \$2 million x 365, that \$780 million dollars of gross proceeds in that one poker site per year. If they had the licensing and the regulation of the state of ND, and a full faith and credit that we are making sure that their games are honest. If they are making \$700 million a year, would they have any trouble paying a \$780,000 tax. In talking to these sites, that would be nominal to them. That wouldn't cause any

problems whatsoever. If you turn to page 3, line 5, Internet live poker proceeds fund. I wanted to be sure, in this bill, that the revenues that we derive for the state of ND go back to the people of our state to a vast majority. My intent of this legislation, is not to have the state legislature receive \$500-600 million a year and for us to try to spend the money. I want to benefit the people of our state the most possible. We put in the bill on line 9, an annual transfer to the counties for direct property tax relief. What number 1 says that 60% of the gross proceeds that come into the state of ND, will go to the political subdivisions to directly offset and reduce the property taxes of the people of ND. In visiting with LC, the wording in here is such that when the money comes to the counties, the mill levies must be reduced by the dollars they receive from this bill. So everybody in the state of ND who pay property taxes, whether you are a farmer or whether you are an individual home owner or apartment owner that has property taxes, will receive property tax relief proportionate to the dollar amounts that come back to your county, 60%. In my example of a half a billion dollars, that would be \$300 million per year, \$600 million per biennium going back to the counties. Number 2, line 16, annual transfers to the common schools trust fund. As we all know as legislators, we are concerned about educating the kids of our state. We're also concerned about the local taxes that have to be raised and so we're trying to figure out where we can get some revenue to help pay for that education. There are some creative things coming up before this legislative body, that we will address as time goes on this session. What I put in the bill, is 20% of the revenue, or in this example, a \$100 million would go back to the education trust fund to help fund education for the people of our state. The last 20% comes to the general fund and we as legislators then would have the opportunity to determine where those funds go and how they're spent. I'm certain that we would use those

funds wisely. That is basically the overview of the bill. There were a number of items as I was going through the draft of the bill, that I forgot to include. There are some amendments for your consideration. There is an additional amendment I would like to offer, that is, I would like to add an amendment in the bill that would establish an advisory committee to the AG, that the AG would appoint an advisory committee (like the lottery advisory committee). The same concept, so that we have some public input to what goes on as this moves forward, as well as the input from our AG and his staff. On the amendment I am passing out, we're adding a couple of items for your consideration. The first area that the AG pointed out to me, is that we need a penalty clause, in the event people violate our laws. We put a penalty clause in there for the people who operate these Internet live poker sites, if they violate the law, they're guilty of a class C felony. We want the AG to have the power and authority that his office needs to prosecute any Internet establishments that break our law. For an individual playing the game, if they are not licensed, they would be guilty of a class B misdemeanor. So we don't want to make that quite so onerous on the individual, but we do want a penalty in there as well. The third item is the Internet live poker records-confidential. I think you can understand that the records that the live poker sites have should not be open, should not be subject to the open records law of the state of ND. That's their propriety list, it would be open the AG but not on the open records. The last amendment, section 3, which after visiting with the AG's office, I agreed to put in there, "This act becomes effective on the date the secretary of state certifies to the legislative council that HCR 3035, as adopted by the 59th legislative session, has been approved by the voters. HCR 3035 simply requires that this will go to the vote of the people in June, 2006 because it would amend the state

constitution to allow Internet live poker establishments to come to our state, be licensed and regulated by the state of ND.

**Representative Delmore:** If I understand what you are trying to do with this bill, we would create a whole, new group of poker casinos. It is interesting to see that you've included as a part of Section 1 of the bill, when is gambling not gambling. It's hard for me to look at this bill and say this really isn't gambling.

**Rep. Jim Kasper:** The bill does not provide for any casinos. These poker sites are actually computer programs. So they are hardware and software. They would probably fit in a small space. I have never seen them, because they are offshore. Nobody would be able to go to the establishments in ND and physically sit down and play. The only way they could play this game, is on the Internet, live action just as my demonstration showed. There's no physical building, it's a site located just like any other computer site.

**Representative Maragos:** Are North Dakotans that go on the Internet, and play live, Internet poker, are they breaking ND law.

**Rep. Jim Kasper:** That was a question asked by myself and cosponsors of the bill, of the AG's office, and we were told that the answer is no. The players themselves are not violating law, the potential is that the poker sites could be breaking the law, where they are located. That's the reason that they are currently located offshore. The intent of my bill to 1) authorize and enable, and 2) to pass a Constitutional amendment, is to say that we've now passed a law in ND that will license and regulate you under ND law. If you read the case histories on the material I'll hand out to you, you will see that legal scholars agree with that position. Under the Constitution, we have state rights in order to regulate and license gambling or any type of game of chance that

we so desire in our law. There's constitutional law history that shows that to be the state right opportunity. Just like we enable the Indian casinos right now under state law. This would be the same concept.

**Representative Maragos:** Will we be in conflict, with federal law, if the resolution were passed and the citizens changed our constitution. Has that been determined.

**Rep. Jim Kasper:** No, there has been no state that has passed legislation like this to challenge the federal law; because again, the stretch of the wire act, passed in 1961, the federal government, in some of the areas are trying to say that this applies to the Internet, legal scholars have reviewed the intent of the law, read the testimony back in 1961, and have said that this doesn't apply to the Internet. They would love a state to challenge it. So we would, potentially, be challenged by the federal government, although the legal decisions and the legal expertise that I've read, which you will have copies of, does not think that will occur.

**Representative Klemin:** We've got the federal law, even if we did all this stuff, due to the supremacy clause, the federal government would say, sorry it still violates federal law, and we would have to have the challenge you are talking about, which would entail some sort of lawsuit, which potentially could go all the way to the US Supreme Court and take quite a few more years to accomplish. It would also cost a lot of money to litigate too. Is that what we're really looking at.

**Rep. Jim Kasper:** I don't know. But I don't think so. Again, after the information I have in here is passed out to you and you have had a chance to read some of the legal scholars' interpretations and comments, I think you would have a better idea of where you feel you are at, on that. Let's assume that occurred. That we were challenged and we went to the Supreme

Court and we won. What benefit do we derive from that challenge and that winning in the supreme court based upon the concept of the bill and the numbers I am talking about. I would suggest that it would be a challenge and a battle that we might wish to engage in as a state.

**Representative Klemin:** Have you discussed or asked for our own AG's opinion, as to whether this proposal would violate federal law.

**Rep. Jim Kasper:** I've been in contact with AG Stenehjem and his staff. They are not going to be here speaking on behalf of the bill, but I don't think they are fearful of the bill, but I don't want to put words in their mouth. That would be something that I think the committee, may wish to ask the AG's representatives. I think they are comfortable. I got no negative feedback from them when we met with one of their staff attorneys a number of weeks ago. I think that would be worthwhile investigating with the staff and maybe the AG. I do want to say on the record, that I have met with Governor, and briefed the Governor and his office on this bill, and his question was also, does the AG give his blessing. I said that, at this time, he has not given his curse, so I think it's something that possibly bears further digging.

**Representative Meyer:** If you could explain to me, if they're offshore now, and not paying any tax, why would they come to ND and pay tax. I don't understand.

**Rep. Jim Kasper:** That's a good question. They are offshore because of their fear of the wire act. Their fear is that if they were located someplace in the US, in any of the 50 states, without legislation like I am proposing, that they fear that they might have a problem with the federal wire act and could be prosecuted under felony. That is why in the writings of this magazine, a guru of the poker world, is this magazine called cardplayer.com. It comes out every two weeks. There are articles in there about the psychology of the game, what's going on, how they're

winning or losing, how you should play your hands, and legal opinions in there. Professor Nelson Rose, is considered one of the gurus of poker, and gambling in general. He has some very interesting articles, and part of my handouts to you will be a part of his articles that talk about this issue.

**Representative Koppelman:** You just said poker, or gambling in general. That leads me back to section 1 of the bill. By redefining lawful contests of skills to include Internet live poker, do you feel that that opens a doorway or gateway to others coming in and saying that Internet live poker is not gambling but is a contest of skill, certainly other kinds of poker are as well, and therefore we want to have that in ND.

**Rep. Jim Kasper:** I think the next bill you are going to hear will relate to that in some way. I was very careful to put in the words, Internet live poker, to try and narrow it, as narrow as possible. My intent is not to define, or not define, live action poker. My intent is to say Internet live poker. Now where we go with that, as far as a challenge, I can't say. Currently, under ND law, it's not illegal to play poker. As a matter of fact, each of us can play poker in our own homes and there are certain restrictions on that, and I have that in the ND Constitution handout.

**Representative Koppelman:** The hypothetical court challenge that could ensue over the wire act you referred to, even if all your hopes were realized and we ended up being scot free in enacting something like this, and let's say it took a legal challenge to settle that. What would prevent other states, or don't you think that other states would immediately, after we have paid the bill, so to speak and plowed the ground, immediately jump on the bandwagon and say some and play in Las Vegas, come and play in Atlantic City, come and play in Miami and then we'd lose all benefits that you hoped to gain.

**Rep. Jim Kasper:** That's a great observation. That's why I would have passed the bill right away, so that we're the first state. There's nothing to prevent the other states, but let's face it, legislation, particularly when you get into the area of perceived gambling, is a difficult area of the law. There have been other states where legislators in the past 8 or 10 years have looked at bringing forth something like this, but have not been able to get it through their legislative body. So, again, I think if we are the first out of the chute, we have the best opportunity; and with our workforce and work ethic, our broad band width capability on the Internet, and the fact that we have a very friendly tax climate in here, a lot of these sites would favor our tax structure. In response to Representative Meyer's question about the taxation. The areas where the sites are located, are taxed there in the locations and I think they are more onerous than the tax schedule I put in here. I've heard something like a flat 8%, we are only doing 8% of the first million dollars, graduated way down. Our tax climate would be very exciting. The thing that makes my bill unique, where some of the areas may not have thought about, is the \$10 licensing fee per player. That's where the bulk of the revenue will come. As a player, I can say for all the games I've played on the Internet, with the play chips, I would be very happy to pay a \$10 licensing fee if I wanted to play with real money, so that I could be sure that the poker site was legitimate.

**Representative Boehning:** I've got a two part question. How many jobs will it create, and where would the jobs be created at.

**Rep. Jim Kasper:** Each one of these poker sites has computer programmers, they generally have a 24/7 call area, where people can call if their computer program gets messed up or something didn't work right, you can call in 24/7. They need management people. I can't say how many people specifically. I would suggest 15, 20, 30, 40 potential jobs. That's a guess.

Don't take that on authority. There's a number of jobs; what they're looking for is good computer programmers, and management style people, and customer service people.

**Representative Boehning:** Would this job, they could basically be located any place within the state of ND, correct, like in small rural communities, more likely create good paying jobs, to use our local college graduates and computer programmers.

**Rep. Jim Kasper:** That's an excellent observation. Our rural areas, we have people who want to work. We've seen that from the economic development opportunities we've tried to bring to rural ND. Customer service people, where can you find better customer service people than in the small towns of our state. Because it doesn't really matter where the site is located in ND, as long as you have the workforce, the right tax climate, and the enabling legislation.

**Representative Delmore:** I share some of the questions about whether we would need federal legislation to do this, but it certainly is an idea that you're bringing forward that is outside the realm. How much are people paid now. When you went into your game, I didn't see you enter any credit card or money. How much are people paying now as they go into the Internet in these offshore sites.

**Rep. Jim Kasper:** As far as paying, when you go into the site, you register and get a pin number, and you have the security there. Then there is a place, if you want to deposit funds into your own account, you can do so. All of these dollars that are being deposited into these bank accounts by these poker Internet sites, have to be deposited some place. Again, the fear is that this money will be taken away from the players. What better place to have the dollars deposited, than in the Bank of ND, guaranteed by the state of ND. When you open up your account, you choose if you want to deposit any money or you just wish to play for play money. If you deposit

dollar amounts, you pick \$10, \$50, \$100, whatever you so desire, and it goes into your account, and it's a separate, segregated fund that is accounted for by that poker site.

**Representative Delmore:** If I am reading this bill correctly, I would need to pay my \$10 if I did that according to this bill.

**Rep. Jim Kasper:** Yes, that's right if you play for real money, then you would be licensed and regulated under our statute and then the first \$10 comes out to pay for the licensing fee. That gets deposited into the state of ND account.

**Representative Delmore:** What do you think this will do to our Indian casinos and to our charitable gaming if this become law. How would this affect some of our other industries that are already in place in the state.

**Rep. Jim Kasper:** I don't believe it will affect it a bit, because it is already going on. This is not something new. These poker sites are there, 50-75 million people in the United States are playing as we sit here today. This is a relocation of where the poker site is, the licensing and regulating of the poker site, and a potential for the state of ND and our citizens to benefit dramatically. It's not an expansion of gambling. They are doing it anyway. So why should we, as the state of ND, not build a field, dream a little bit and let them come.

**Representative Charging:** There are a couple of laws, more than just the wire act you described. There is another big law out there in the federal system, called the Indian Gaming Regulatory Act, which is another hurdle you are going to have to overcome.

**Rep. Jim Kasper:** Whatever the hurdles are, we will work on them. I can't say that I've looked at all the federal hurdles, but in the reading I've done, it's clear to me that the federal government cannot prohibit any state from enacting gaming and gambling legislation, just as the

state of Nevada has done, where they have private and public casinos and Indian casinos. I don't think that would be a major hurdle. If it is, we would need to look at it, but I don't suspect it would be.

**Representative Charging:** Currently that law offers a gaming compact between the tribes and the state, under which specific kinds of games can be played. I would see this as a potential threat to those.

**Rep. Jim Kasper:** Again, let me make it clear, we're not expanding poker at all. It's already happening. People are playing on these sites as we speak. So if it's a threat to the Indian casinos now, when they're offshore, it's a threat if they come to ND. That threat doesn't change. A lot of experts would say that the more people play on the Internet, the more familiar they become with the game, the more they are likely to play in the Indian casinos, with the live action poker games. You can get bored after a while playing on the computer, but it is more exciting to play in the live action poker tournaments, where you are face to face with people. It's more fun. I don't see it as a threat, I see it as a potential enhancement.

**Representative Charging:** In section 1, under the NDCC, you talk about gambling and then in a) you listed it as a contest of skill.

**Rep. Jim Kasper:** What I have said, if you look at the bill, on line 11, gambling does not include: going on to lines 12 and 13, lawful contests of skill, including Internet live poker. So I state in the bill that Internet live poker is a game of skill, not gambling. Again, to cover the other side of the coin, if that would not be so under the state constitution, that's why we are going to HCR to ask for a constitutional amendment to allow it to happen. I believe that poker is much more a game of skill, than it is a game of chance or gambling. I understand that the medium that

you play in a poker game, if you're playing for money, is money. But you could play for chips, you could play for toothpicks. You can play for whatever you wish. The skill involved, in reading your cards, and reading the players you play against, and making decisions you make, is a whole lot more skillful and much different than sticking a quarter in a slot machine and pressing the button, and hoping you might win something.

**Representative Delmore:** The fiscal note with the bill, how much will this hurdle cost us, even to take it before the voters without really knowing whether it is constitutional or federally approved.

**Rep. Jim Kasper:** I don't have the answer to that question. We would probably have to ask the AG or the Secretary of State. I don't know if it is onerous to print one more line on the ballot. It may have an extra bit of paper on the ballot, but again I suggest this, and I hope the committee will keep your eye on the fact that there is a potential here for a huge windfall for ND, the fact that we would be the first state, that we would be blazing new territory. But think in terms of what happens if this would happen. What type of positive impact would the state of ND occur for the millions and millions of dollars of revenue that come to our state to help reduce our taxes and fund our education programs. It's an opportunity I think, there's a window here. There's one state that's going to step forward and do this. I suggest ND ought to be the first state.

**Representative Maragos:** If an Internet provider, if all things came into place as you had envisioned, came to ND and we taxed his revenue, would they lose part of their revenue to us that they are currently making now by not being in the US, or are they being taxed by the localities where they are currently located offshore, so it's not really important to them from a

taxing standpoint, whether they are located offshore or within the continental United States. The only thing that's important to them is that they'd like to be able to provide their Internet service on US soil. Can you elaborate for me.

**Rep. Jim Kasper:** In the reading I've done, and in talking to a couple of the Internet site owners themselves, they are being taxed offshore, and in some cases the taxes are not to their liking, but it's the only choice that they have is to be offshore, because no state has passed legislation like this. The word I got from them, is if you have a fair tax climate, that will not be an impediment, and the research I've done I've seen a flat 8% tax up to 30 or 40% tax. I think the tax structure in the bill, would be a very friendly situation compared to the situation they are now in. I think it would be a reason for them to come to ND, as opposed to stay away.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Rep. Ron Iverson:** I wanted to address two issues that were brought up during Rep. Kasper's testimony, regarding Representative Koppelman's comment that would other states do this after we got it passed. I think that would happen. The thing is that the businesses would be already starting to set up here in ND, and they would go to the place that has the best tax policy regarding this. The second point is the money laundering issue. There is a huge issue with money laundering with these sites. If they were to locate here, that would stop. Also, the legitimacy of the game, that would be the key factor for the people wanting to register and come to these sites to play. I want to add my full support to this legislation.

**Chairman DeKrey:** Thank you. Further testimony in support.

**Rep. Mark Dosch:** I want to commend Rep. Kasper for bringing this legislation forward. We are always talking about doing something different. We talk about looking outside the box. This

is one of those things. I challenge this committee to think about when the SD legislature did something absolutely ridiculous, about 15 years ago. They eliminated their usury limits on credit cards. You talk about anti-consumer thing, when interest rates were 21%, everyone was saying, what are they doing. They've got to be crazy. They took that step, and today SD is the #1 spot for credit card company processors to locate in. The amount of revenue, the billions that have come as a result of this simple piece of legislation has made a phenomenal difference in the state of SD. SD is rated #1 in the nation for the business climate. What SD did, and what the tremendous impact, positive impact, that had on the state of SD, the world didn't end, credit card companies weren't charging 100% on their credit cards. I believe that for the state of ND, we need to be strong and take on this challenge and not be afraid to step outside the box.

**Chairman DeKrey:** Thank you.

**Representative Maragos:** Under lawful contests of skill, what is a skill and what is chance. Do you believe that picking stocks in the stock market is skill or chance.

**Rep. Jim Kasper:** I would suggest that it is both a skill and a chance. The answer would depend upon the degree of sophistication you, as the picker, has. If you're in New York working for one of the big wire houses and have been there your whole career, and look at stocks on a daily basis and have the opportunity to deal with analysts that analyze stocks, I would say it is much more skill than chance. If you're like me sitting here in ND, and I'm trying to buy a mutual fund and don't know any of the management people from General Motors or any other company I might wish to buy, that's much more of a chance. Then you go to the question of what type of advice and counsel am I going to receive from my choices. It depends upon your degree of sophistication.

**Representative Maragos:** Well, if a person picked a series of outcomes like in football, would that be a skill or would that be chance if you know that everything is exactly the same for the other person you are competing against.

**Rep. Jim Kasper:** First of all, you don't know that answer, do you. You don't know if the circumstances are exactly the same. Does that other person have inside information or not. The area you are going into is much different than live poker. When you are playing live, Internet poker with a game where people are on the Internet in live time, you are playing against real people and you are making real, live instantaneous decisions at that point in time, based upon those two cards in front of you and the probability of those two cards being the best two cards. Based on what you're dealt, you make your first decision, do I want to participate or not. That's your decision. There's no chance involved in that, you decide whether you will play or not. Then you keep making decisions along the way, based on facts that are right in front of you at that point in time. The degree of skill in poker is way beyond the examples you are trying to use, in my opinion.

**Representative Maragos:** You brought up the word, probability. I wonder if you really understand what probability is.

**Rep. Jim Kasper:** I would love to yield to your interpretation and be educated.

**Representative Kretschmar:** Would you have any objection to placing an amendment on HB 1509, that would say it is not effective until HCR 3035 is passed by the people of the state.

**Rep. Jim Kasper:** Not at all, that was the intent of the amendments that I passed out. I think that added that to the bill. HCR 3035 must pass before this could go into effect.

**Chairman DeKrey:** Thank you. Further testimony in support of HB 1509.

**Todd Kranda, Charitable Gaming Association of ND:** We had a brief meeting with Rep. Kasper and CGAND does not believe that HB 1509 will have any negative impact upon charitable gaming activities that are occurring in the state. Internet live poker is already occurring, it's out there. Accordingly, CGAND simply supports this legislation.

**Representative Kretschmar:** Have you had a chance to review any of the federal statutes that exist, that may have a negative effect on the bill.

**Todd Kranda:** I have not. In my discussions with Rep. Kasper, he's the one that has indicated the wire act as a concern and suggested the opportunity that ND has. I have not personally reviewed the legislation.

**Chairman DeKrey:** Thank you. Further testimony in support of HB 1509. Testimony in opposition to HB 1509.

**Warren DeKrey, ND Council on Gambling:** We are opposed to this bill. I would question the legality of this bill. Poker has always been defined as gambling, and I would assume that that would still hold. We are talking offshore Internet, anytime we talk about offshore, we often think about the criminal aspect of it, is it really well regulated. Is it something that isn't being fixed. Since no state has authorized this, there must be some real reasons why they have not authorized it. If we are to offer it, we would certainly want to be very well informed on it because there could be some real pitfalls in this whole thing. I question the base for funding for the state of ND. We need a legitimate base for funding our state government. I question that this could be considered a very strong base. It could disappear and go away, and then we would be in even more trouble. If other states would authorize the same thing, what would happen to the revenues we might receive here. This is electronic gambling, video gambling. We seem to be in a frenzy

over gambling these days. To me, this is a very questionable type of business, state of ND should get in. Our grandchildren and great grandchildren will see this come in and they will then question later on, what were our grandparents thinking of, getting us into this kind of a business.

**Representative Kretschmar:** Has your group done any research on the prevalence on this Internet poker game being in our state right now. Do you know how much is being done.

**Warren DeKrey:** No, we have not. I just want to read a comment that comes from Dr. Guy Clark, who is chairman of the National Coalition against Gambling Extension. He said, if we cave into Internet gambling, every family room in America can become a casino. High speed video gambling machines are the crack cocaine of gambling addiction, and those are the very games that the Internet is best at providing, and youth are twice as likely to become addicted as adults.

**Chairman DeKrey:** Thank you. Further testimony in opposition.

**Art Link:** I made a commitment to this committee once before, that as long as you engaged in these discussions, the approval or disapproval of the expansion of gambling, I would be back. There were some members of this committee that said, this is all we're going to ask for. We'll never ask for anything more. But we're confronted with another request that I didn't know about until this morning when I picked up this bill. I can't help but share it with you, as most of you are aware, that we've gone quite a ways since the first charitable gambling was authorized in the state, and it was based upon the concept that it is for charity. That didn't last too long. I made the statement then, that gambling has an insatiable appetite. It is never satisfied, it goes from one thing to the next. Then came the question about the pull tabs, powerball, the lottery. The question was placed before this committee, and finally before the people of ND, that based upon

the money that was going out of state, because other states were doing it, we had to do it. People were convinced that we were losing money by lottery being played in the sister states around us and we were losing money. We now have the top floor of this capitol filled with the offices of the lottery and I understand that there are other places where we have to have personnel to control the lottery, to manage it. I'm not here to discuss that, that's already been decided. This is a new step, and I would caution this committee to be very, very cautious about making this step. The statement was made, that if they decided to come to ND. There is no assurance that they would come to ND with this grandiose presentation. What's to stop other states from seeing what's happening here. Then you're in a competition with other states, trying to offer the same thing and in competition with the rates that we charge them, there will be a war on who can offer this service at the most attractive rates to the organization that is going to handle this. There will be companies who handle this, and we'll be in a war with them. By the time we get into the act, the rates will be so skimpy that it'll hardly pay for the cost of running the program. That's my negative opinion of what is being said here. I guess I have to ask ourselves, are we so bankrupt in ND that we have to depend on the whims of people who wish to play the gambling games. This bill now says that gambling does not include Internet live poker. Who's to say what gambling is, you have these very fine definitions, do you know anything about the outcome, is it all chance. It's still gambling. I think this puts a rather negative complexion to our great state, with all its resources and integrity that this state has. I think we can devise a fair method of revenue to provide the public services that the people need and are entitled to. I don't think we should place our faith in some grand program that takes it out of our hands, that the activity will

just fall into our state and result in millions of dollars for our state. This is just a little more than I can handle. I submit that we should not subject our state to this type of revenue selection.

**Chairman DeKrey:** Thank you. Further testimony in opposition. We will close the hearing.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1509

House Judiciary Committee

Conference Committee

Hearing Date 2/9/05

Tape Number	Side A	Side B	Meter #
2	xx		25.4-end
Committee Clerk Signature <i>Dawn Penrose</i>			

Minutes: 14 members present.

**Chairman DeKrey:** What are the committee's wishes in regard to HB 1509. There are two sets of amendments that have been talked about already. The first amendment was that this bill goes away if the constitutional amendment accompanying it does not pass by the voters.

**Representative Koppelman:** I move that amendment.

**Representative Delmore:** Seconded.

**Representative Klemin:** Along with this bill, we have this constitutional amendment, it seems to me that if we leave the amendment on 1509 is not effective unless the constitutional amendment fails to pass the voters. If it fails to pass the legislature, shouldn't that be the cutoff point because otherwise this could be held open indefinitely. If the constitutional amendment, doesn't pass, 1509 should go away at that time, not wait until later.

**Representative Maragos:** Pending change of the constitution...

**Representative Klemin:** I don't seem to have that amendment language here. Here it is, I guess what I'm saying is that we shouldn't leave it hanging out there, if it doesn't get past the legislature.

**Representative Koppelman:** Well it's affirmatively worded, so it wouldn't be hanging out there, it says it becomes effective when the Secretary of State certifies it, if the Secretary of State doesn't certify it, it doesn't get past the legislature ever.

**Representative Klemin:** It can be approved by the voters in more than one way.

**Representative Koppelman:** That's true, and you want that. If we were to defeat it, and it came back as an initiated measure and the voters approved it, we'd want it to become effective then.

**Representative Maragos:** Basically, if you waited for the reverse, it would be slowing down the whole process.

**Representative Klemin:** Why would we want this bill to be hanging out there as a bill that could pass this legislature, if the legislature disapproves the constitutional amendment. I don't think it should become effective if we don't pass the constitutional amendment, it shouldn't become effective either.

**Chairman DeKrey:** So if adopted and approved by the voters or the legislature. Would that get rid of it for you.

**Representative Klemin:** I would have stated it affirmatively that this act will not become effective unless the legislature approves this bill and the voters.

**Representative Koppelman:** That's already what it says. It says it becomes effective when that resolution is adopted by this legislative assembly and have been approved by the voters. So if either of those things don't happen, it doesn't happen.

**Representative Klemin:** There is no deadline on this.

**Representative Koppelman:** Yes, it says 59th legislative assembly, that's this year.

**Representative Klemin:** No, approved by the voters, there is no deadline on when it gets approved by the voters. So what is going to happen is we're going to have a section in the NDCC, that's going to stay in there indefinitely with a code revisers note saying this is the law but it's not effective.

**Representative Koppelman:** It says it becomes effective when the resolution 3035 as adopted by the 59th legislative assembly, which is this assembly meeting right now, has been approved by the voters. If either of those things doesn't happen, if this assembly doesn't adopt it, it's dead. If the voters don't approve it, it's dead.

**Representative Klemin:** I see what you're saying. As adopted, so you're saying...

**Representative Koppelman:** If it's not adopted, it's dead. If that constitutional amendment is not adopted by the legislature and approved by the voters, the bill is dead.

**Representative Maragos:** That's already amended in.

**Chairman DeKrey:** That's the amendment I moved was .0301 by Rep. Kasper dated January 28, 2005. That's what we're working on now.

**Representative Klemin:** Can we find out if Rep. Kasper's other amendment affects this one or not.

**Chairman DeKrey:** Your other amendment is going to change on section 1, that's not going to affect this first amendment, then.

**Rep. Kasper:** No. I don't believe so.

**Chairman DeKrey:** We'll try a voice vote. Motion carried. We now have the bill before us as amended. Rep. Kasper please present your next amendment.

**Rep. Kasper:** Now that you've adopted those amendments. On section 1 of the bill, I've had some feedback from some of our colleagues and a little feedback from the Attorney General, that he's concerned about the entire section 1, because section 1 is change the definition of poker, Internet live poker and say that it is not gambling. Frankly I drafted the bill, before the HCR 3035 was drafted, thinking that I might not have to go to the constitutional amendment route, and again after speaking with the AG, he convinced me that we needed to go the constitutional amendment route. The amendment simply does one thing, it removes section 1, and therefore, under the amended amendment that I passed out to you, we do not attempt to redefine Internet live poker as not gambling. It would stay under the ND constitution as a gambling activity, not a skill activity. I don't think it changes the intent of my bill at all, because we still need the constitutional amendment, and I would ask the committee to adopt the amendment. All the rest of the language stays the same.

**Chairman DeKrey:** The other amendment that the committee members want, was that there should be some mechanism in this law, that if the federal government should challenge ND, that it goes away, because I am hearing a lot of people saying that they don't want to spend millions of dollars defending a federal lawsuit against ND, because we passed an unconstitutional law.

**Rep. Kasper:** I would resist that amendment, and I think these handouts may give you some comfort in that area. I'm going to page through this with you if you don't mind because I know there was concern about that, particularly Representative Klemin expressed substantial concern in that area and I appreciate that. So I've been busy on the phone doing some research and receiving some e-mails that have been unsolicited and I believe the handouts that I'm giving you are really sort of germane to that concern. I'm going to summarize these handouts and you can read them at your leisure later. The first one, online poker legality by Allyn Jaffrey Shulman, she's an attorney at law in Los Angeles, and she's an expert in gambling law, and I have been on the phone with her a number of times, and this is her history of the wire act, and how the wire act, the RICO act, the 10th amendment, the position of the federal government, and so on come into play. If you read it, I think you will see that the wire act does not at all conflict with what we're trying to do here. The wire act was designed to in the area of sports betting, it's a very narrow thing, there have been some challenges to it, and the courts have overturned those challenges and ruled in a couple of cases, that Internet poker or Internet activities are not under the wire act. The next one gives you a little more in depth history, there are 3 or 4 pages, again from Allyn Jaffrey, going back to 1995 in the history of what has happened in Congress, and it is apparent, she makes a statement in one of her writings here, that if, in fact, the wire act applied to Internet poker or Internet gaming, why would there have been bills introduced in Congress to try to regulate it. It's very apparent that the wire act does not apply to the Internet. There again, her synopsis is about 4 or 5 pages for your review. I will be meeting with the Governor and the AG on these matters that I'm going over with you and to bring them up to speed. The third set of handouts from Allyn Jaffrey is a little more in depth on the wire act, going back to Judge

Duvall's ruling that the wire act, if you go down to the third paragraph, as I reported in August, Judge Duvall ruled that the wire act only prohibited wagering on sports events and he dismissed all 33 cases. Comparing the fact, based on the wire act and the history surrounding the recently proposed legislation, it becomes more certain that the wire act's prohibition of gambling activity... (see written testimony). There's another brief written by an attorney Jaffrey that is about 4 or 5 pages, In my opinion (see written testimony). It discusses the wire act and online gambling or poker. Then the liability of the online gambler, there is concern that people may be breaking the law if they are playing on-line. What she has proposed in her writings, if there is a state law, in your state, that specifically prohibits that you cannot gamble online, then you may be violating your state law, but it is not a federal law. ND does not have any law that prohibits that. Then she goes on to talk about how would the poker police ever find somebody sitting at home, playing in the security of their home on the Internet. The one that was the most impressive to me is the one where it has my name at the top and it's from Frank Catania. This was an unsolicited e-mail that I received on February 4th (see written testimony).

**Representative Meyer:** What's to prevent, and my constituent is in favor of this bill, keeping in mind Las Vegas and New Jersey have much more gaming than we do. What's to prevent it from happening, where if ND takes this on, and say there is a lawsuit, what's to prevent the minute that ND goes through all the jumps and hurdles and presuming that is going to cost us some money, that we establish this criteria, that it isn't taken away from us from New Jersey and Las Vegas.

**Rep. Kasper:** First of all, that after you read the handouts I've given you, I think your concern about a federal action against the state of ND should be solved. Secondly, if there is a lawsuit, I

think we would prevail. Thirdly, if we don't the law would be binding on all the other states, because if ND could not license and regulate Internet poker sites, the other states would be prohibited also.

**Representative Meyer:** But say we go to the expense and we set national precedent that it's okay, his question is what is to stop them from instantly taking away this from ND.

**Rep. Kasper:** There's nothing to stop any other state from jumping into the game so to speak, but remember we will be the first out of the chute. So in talking with some of the folks, and the magazine I gave you the other day, I have 200 copies of them, I am going to hand out 1 magazine to the whole chamber so you can read the articles about this profession. It is becoming a profession, much more so than a game. What I'm being told by the editor of the Card Player Magazine, he said we're right on, he says I'm going to promote what you're doing in ND through my magazine, I'm going to be in contact with people to start paying attention to looking to come to ND if this gets through the constitutional amendment, he has volunteered to be here in March, if we can pass this out of the house and get it over to the Senate, he will be here in March to testify in front of the Senate committee that will hear this bill the second time, and he says that the first boy on the block is the one that is going to be the winner. Because once you locate to another state, and he said the tax climate in my bill is very favorable, once you come to ND you're not going to go anyplace, because you are the ones that opened the door. So that's as far as I can go, because other states could do this, and we can't prohibit them.

**Representative Klemm:** In just looking through these materials, it made me realize something I hadn't thought about here, is that this would allow video Internet casinos to be opened up in ND at existing gaming places, so people that don't have Internet access, could go in there and use

that Internet computer that's sitting in this existing casino location. That appeared to be a concern of somebody that was mentioned in one of these states, that you would have Internet video casinos locating physically, so that you would have a battery of computers sitting there and go in and rent one, whatever, can you do that.

**Rep. Kasper:** That's not the intent of this legislation at all, and if there's a concern about that, I would certainly not oppose amending the bill to tighten it up so it's very specifically, this is designed to be, licensing and regulating Internet poker sites that come to ND and have their computer programming and staff here for it to be played on the Internet, as I demonstrated to the committee during my initial testimony. Any amendment that would solve your concern, so that we would not have those places spring up in ND, I'm all for it. That's not the intent, it's not my desire.

**Representative Maragos:** I'm not sure I'm following what Representative Klemin is addressing himself to. If you went to an Internet cafe right now, they could go online and play poker there, couldn't they.

**Rep. Kasper:** Certainly.

**Representative Maragos:** What is it your addressing yourself to, what would it allow that is not currently being allowed.

**Representative Klemin:** I guess I'm not to sure, that you can go to an Internet cafe business in ND and play poker online.

**Representative Maragos:** Why not.

**Representative Klemin:** I don't know if you can legally do it.

**Rep. Kasper:** Well all you have to do is follow the money. If we had a restaurant where you had these Internet hookups, and one of them brought in a computer in there to hook up and play Internet poker, how does the restaurant make any money, they don't make any money, so there would be no reason for them to even promote something like that.

**Representative Klemin:** I understand that, but my point is that there are literally thousands of people in ND that do not have computers and Internet hookups, who maybe could go to a location here in ND, where they would have rows and rows of these computers and start renting computers there to do this Internet gaming. I don't know how it would shake out as far as them taking a cut off what you make or what they would charge for it, but it seems to me that this could conceivably result in a considerable expansion of video gaming.

**Chairman DeKrey:** I think Internet access is so universal nowadays, I don't think anybody, people go through airports and get their e-mails.

**Rep. Kasper:** You can do that now without this bill.

**Representative Klemin:** My point is, I think there are a lot of people that don't have Internet access and computers now, that would have ready access to this kind of gaming if we were to allow this.

**Rep. Kasper:** They have that access right now, whether my bill is passed or not. They can do that today.

**Representative Klemin:** If they have the Internet and computer. If they don't have it..

**Rep. Kasper:** I think if we get back to the focus of my bill, there are hundreds of poker sites out there, if we build it they will come. Think if they are licensed and regulated, which they wish to have by the way, the potential revenue stream to our state, whether people play it in a cafe or

bar, or a computer hooked in, that's not our affair, that's freedom of choice I believe in our constitution. But what we can do is license and regulate these Internet poker sites so that we know they're legal and the revenue stream from the generation of the licensing and regulation comes to the people of our state. I think if we get back to the focus, what is the good out of the bill, if the bill passes and the constitutional amendment passes.

**Representative Klemm:** You will recall that I was concerned about the legality of this under federal law, and I noticed that the Los Angeles attorney says that both the Clinton and Bush administrations maintain that this is illegal and I had asked you to get an AG's opinion from our own ND AG that says that this is going to be legal before we did that, and I don't know who this Los Angeles attorney is, obviously someone who is very interested or works for these Internet places. I guess I would be a lot more comfortable if the ND AG was in agreement.

**Rep. Kasper:** When we have the meeting tomorrow, that will be on the table. Frankly I haven't had time to address that with our IBL's committee work. Here's the gambling laws of all the other states for my last handout, so you can see what the gambling laws are in those states.

**Chairman DeKrey:** We will recess and take it up on Monday, 2/14/05.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1509

House Judiciary Committee

Conference Committee

Hearing Date 2/14/05

Tape Number	Side A	Side B	Meter #
1		xx	0-28.5
Committee Clerk Signature <i>A. Penrose</i>			

Minutes: 13 members present, 1 member absent (Rep. Bernstein).

**Chairman DeKrey:** We will look at HB 1509. We are waiting on some amendments from LC.

**Representative Klemin:** I am handing out the constitutional provision in the gambling statute, on what's illegal in ND. The first part we see here is the section from the constitution that would have to be amended in order to allow this Internet gaming poker, and there is a separate resolution to do that. Beyond that are the criminal code provisions on gambling. The reason I gave you this is because there seems to be a lot of talk about whether 1509 is okay because everybody is doing it, and there's nothing that says you can't do that. In my reading of the statute, I think that's not exactly true. I think that if somebody is at home doing Internet video poker, that they are governed by the same statute, because the computer, hardware and software you're using, becomes the gambling apparatus. If you go to section 2, which is on the second page, that makes it an infraction to be gambling on private premises if the amount wagered exceeds \$25 per individual hand, game or event. Now this was intended to allow the small game

that were supposed to be played at home, in private, but even there if it is more than \$25 a hand, it is not legal.

**Representative Maragos:** Per bet.

**Representative Klemin:** Per hand, game or event. So I guess what I'm saying is that you are playing an Internet video poker, and it's more than \$25 per individual hand, game or event, then I think it violates the statute. Secondly, it was mentioned that while you can go into an Internet cafe and do this now, and it's okay, I don't think so, because we don't allow you to go into any kind of public business to do that now. You can only do that at home, except where we've allowed the two times per year, the poker tournaments. I don't believe you can go into the Internet cafe and engage in Internet video poker, legally under ND law at this time.

**Representative Meyer:** That came up during the testimony, they were asked that specifically, is it illegal to do this in ND, and we were told "no".

**Representative Delmore:** We've had the same discussion time and time again, on the idea that the sports pools, many of them exceed, and many are in public places, it's not enforced, it's like the cohabitation law, I mean people just think it goes because it isn't. Maybe what we should do with this bill, is do what we did with the lottery. If it gets the constitutional amendment passed, next session we can make rules for it, rather than passing legislation that unless we can get the constitution revisited, it's really not legal.

**Representative Kretschmar:** I have a recollection that someone in Cass County was prosecuted for doing Internet gambling. The person entered a plea of guilty, I guess, and has since moved out of state, and paid a \$500 fine or something. I don't disagree with

Representative Klemin on his interpretation of what is gambling or not, but you know if you go

into any bar or even restaurants in small town ND, you go in and ask for the dice, to roll for who pays. In the restaurant in Ashley, every morning we play what is called the number game, for a cup of coffee.

**Representative Maragos:** I want to remind everybody that this bill isn't really your traditional gambling bill. What this bill really intends to do, is to allow an activity take place in ND that's already taking place in the country. We're not looking at it from the standpoint of bringing any gaming activity to ND, this bill, I believe it is the hope of the author of this bill, to bring an economic activity to ND that's really going to benefit the state, with regard to something that's currently happening. My idea has always been that if the window is open, you better be ready to jump through it, because that opportunity only comes by once in a lifetime. You can agree or disagree with some of the philosophical part of gambling, but what we have to do, I believe, is go ahead. If we decide that we want to afford ourselves this opportunity, the economic gain, of the possibility of those sites being placed in ND, where we can tax them and gain revenue from the activity, that's going on around the US, around the world; because the Internet is worldwide. I would certainly try to proceed, go ahead and pass the bill, and then if the people of ND, everything is contingent upon changing the constitution. That's just fine. But we should not, I appreciate what Representative Delmore has said about changing the constitution first and proceeding later. But the problem is that if you are not first, you are probably not. My idea is to go ahead and move the vehicle forward, contingent upon the decision of the voters at the next election; which might be too late anyway. It may well be too late, we don't know what the other states are doing. Obviously, ND is not way ahead of the curve on this one, but we're trying. I would certainly try to move this bill forward, especially since it has the contingency that nothing

can happen until the voters of ND decide what our state policy will be in this regard. If they even get it to the ballot.

**Representative Delmore:** And we've added that amendment already.

**Chairman DeKrey:** I'm waiting for it (at this point, Chairman DeKrey explained to the student visitors what the bill is about).

**Representative Koppelman:** I don't know if I support the bill, because of my basic philosophy against the expansion of gambling. I know you can argue whether this is or not. I think Representative Maragos' right about what he said. If Rep. Kasper's ideas are to advance, I think we almost have to pass it this session, which would allow the people to vote on it this fall, or whenever the next election.

**Representative Maragos:** That would be the primary election in 2006, a year from June.

**Representative Koppelman:** I think that's probably our best shot at being first, if that's our objective. As far as Representative Klemin's comments, I think Rep. Kasper's original idea to reclassify the status of what poker is probably would have addressed your concerns, I don't know if that is the way to go; but I think that was his approach. If we're not going to do that, then I think at some point we may want to look at those statutes.

**Representative Klemin:** My point was I think it is illegal, it maybe isn't enforced.

**Chairman DeKrey:** I thought that same thing when you said it.

**Representative Onstad:** Typically this site that everybody is logging onto, they are located off shore. This particular bill allows that place to be located in downtown Pettibone, right. But I don't believe that the bill allows us to have Internet cafes located across ND.

**Representative Klemin:** Licensed Internet live poker establishment means any premises licensed by the attorney general to conduct games of Internet live poker.

**Representative Maragos:** Is that current law?

**Representative Klemin:** That's in the bill. I don't see where it wouldn't allow that if they become licensed, they sure could.

**Representative Onstad:** Maybe that portion could be taken out of there.

**Chairman DeKrey:** If you take a look at the amendments I handed out, my reasoning for this amendment, was that should this bill pass, should the people have the constitutional amendment, and the federal government, because of the federal wire act, some people think it is unconstitutional, I didn't want actions that the Legislature took, to end up costing the taxpayers of ND money in defending an action that the federal government might file against ND. So I put this amendment together, which said that if the federal government would file an action against ND, which challenged the constitutionality of this act, then the act would become ineffective, and ND wouldn't have to defend it. Since then I've talked to the AG, and the bill sponsor, and they feel that this amendment, even if everything happened, would scare these people off, because they would look at that and they would not want to come to ND and start a business, that if somebody filed against them, that they would be out of business immediately. So the language of the new amendment... Go ahead Vonette.

**Vonette Richter:** In discussing this amendment with Jay Buringrud, we were talking and if there was an action to stop or challenging this bill and the federal government prevailed, what you're asking for is what they would get anyway. They are going to seek an injunction to stop this or whatever. If they are challenging the constitutionality, and they win, this bill would no

longer be effective, you wouldn't need that provision in there. That's what they would be asking for, and it's like any act declared unconstitutional. It's just no longer in effect.

**Representative Delmore:** So you're telling us that there really isn't any need for this amendment or another put on, because it would already happen.

**Vonette Richter:** That's what would happen. I can still do the amendment.

**Chairman DeKrey:** I don't think that will be needed, we all understand what you're saying.

**Representative Koppelman:** Did you draft the bill, Vonette.

**Vonette Richter:** Yes I did.

**Representative Koppelman:** On page 2, lines 8 and 9 there has been some discussion over whether this equals Internet cafes where people can come in and play Internet poker, my reading of it, I don't think it means that. I think what this means is these are the sites that would be licensed to conduct this game worldwide, over the Internet. It's not a place where citizens of ND come in and log on to a web site and play the game. Is that correct.

**Vonette Richter:** I would interpret it the way you explained it.

**Representative Maragos:** It's just the site, where the hardware is, that allows the game to go out on the computers.

**Vonette Richter:** That's correct.

**Representative Klemin:** I guess I'm at a loss to see what would prevent anybody from going into an Internet cafe and playing now.

**Representative Maragos:** One does it now.

**Representative Klemin:** We have that it's illegal under ND law. It says in the statute that you can't do that. Just because you disagree on the enforcement, doesn't mean it's legal.

**Representative Maragos:** In order to be this Internet establishment, it has to be licensed by the AG. Obviously, if I understand the bill, he's going to license the people that put it out on the worldwide web. He's not going to license an Internet cafe. He doesn't do that now.

**Representative Klemin:** But then you could go into an Internet cafe and do that.

**Representative Maragos:** You can do it now. Even if they are breaking the law, Representative Klemin, they're breaking the law. That's just like the pool, that has to be enforced.

**Representative Klemin:** So do you think that it would be legal then if you passed this bill.

**Representative Maragos:** No I don't think so. I don't think it would change the legality of what you're talking about unless we change statute.

**Representative Zaiser:** I just wanted to echo the comments of Representative Maragos, I think ND we have this penchant for not being the first, and waiting to make sure everything is safe, and 30 states have done it, 40 states have done it. I think if Rep. Kasper is correct, this does represent that window of opportunity and I think if we don't climb through that window this session, that window may close, and I really, maybe it's not the windfall that he's talking about, but I think we really ought to explore. We don't have huge revenue sources in the state, so I guess we should move forward with this.

**Representative Klemin:** The thing that bothers me about this whole thing, is that we should be the first. We have states that have full-blown casinos, Nevada, New Jersey, and they're not doing it. I can't believe that places that have taken advantage of every kind of gaming there is, and no one is doing this or allowing it in any state, there's got to be a reason.

**Representative Maragos:** May I explain. The reason is that they don't want to lose their revenue in New Jersey and Nevada. Anybody that sets up a site and gets licensed, doesn't have to be a casino in Nevada or a casino in New Jersey. This opens it up. It makes the pie smaller.

**Representative Klemin:** There are other states, too, that don't have the big Nevada/New Jersey casinos.

**Representative Maragos:** Everyone has gaming in their states except for Utah and Hawaii. All I'd say, is I can certainly understand why the states that have legalized, the real full-blown legal casinos, like New Jersey and Nevada don't want it, because it cuts into their slice of the pie. It diffuses the pot, and that's probably why they are trying to get the Feds to make sure that this doesn't happen, that it's not legal.

**Representative Klemin:** If I were in favor of the charitable gaming in ND, if I were in favor of the tribal casinos in ND, if I were in favor of the lottery in ND, I would be saying that we shouldn't do this.

**Representative Maragos:** Until 2004, everybody was against the lottery.

**Representative Zaiser:** First of all, I don't think this is going to compete with the local charities in terms of a revenue source, and secondly, as many have said, this is happening now all over the place, so I don't think we are expanding charitable gambling, I don't think we are expanding the game.

**Representative Boehning:** Looking on page 2, line 8, maybe we need to put some language in there that says that what it amounts to is where the hardware and software is held. That's it. When we're talking about hardware and software, we're talking about computer and programs

itself, if we could limit it to that, it would probably help Representative Klemin's concerns.

Maybe we can make that as something having to do with computer systems only.

**Representative Meyer:** What you're talking about, it's a live Internet site. I think that this language defines that. It says the licensing and regulation of live Internet poker site, for an Internet live poker site, it doesn't have to be a casino, that is what makes this legislation unique, it's not an actual site, and I think that's defined just by the definition of being an Internet site. It's not a casino.

**Representative Maragos:** It's a virtual casino.

**Representative Klemin:** Hypothetically, you could go into a local Internet cafe, and get 6 people on terminals and they could all be at the same virtual table, at the same time, playing just like they were doing it live.

**Representative Maragos:** Couldn't they do that now. They can do it now.

**Representative Zaiser:** This is like horse racing, virtual horse racing.

**Representative Maragos:** Why couldn't they do it now, Representative Klemin.

**Representative Klemin:** Because I gave you the statute that says it is illegal.

**Representative Maragos:** You mean that it's illegal, but you say if it passes, it would be legal.

**Representative Kretschmar:** No.

**Representative Maragos:** I think you are confusing the site establishment, with an Internet cafe that is on-line.

**Representative Klemin:** Right, if you have 6 people that are on-line at the same table, at the same time, it's practically the same as if they are sitting at a table in the place.

**Representative Delmore:** We have two sets of amendments. Did we adopt them. The amendments that Rep. Kasper gave us should probably go on the bill. **I move amendments .0303.**

**Representative Meyer:** **Seconded.**

**Representative Kingsbury:** Just one little comment about the whole bill, I think it's a chilling effect, and I'd like to close the window.

**Chairman DeKrey:** Motion carried. What are the committee's wishes.

**Representative Meyer:** I move a Do Pass as amended.

**Representative Boehning:** **Seconded.**

**8 YES 5 NO 1 ABSENT**

**CARRIER: Rep. Kretschmar**

**DO PASS AS AMENDED WITH REREFERRED TO APPROPRIATIONS**

# FISCAL NOTE

Requested by Legislative Council  
02/16/2005

**REVISION**

Amendment to: HB 1509

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Expenditures</b>	\$0	\$0	\$723,488	\$0	\$388,804	\$0
<b>Appropriations</b>	\$0	\$0	\$723,488	\$0	\$388,804	\$0

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

**2. Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

After review of research from a December 2002 General Accounting Office report entitled "INTERNET GAMBLING – An Overview of the Issues" and review of industry information, this office is unable to determine the possible revenue impact of this bill. One gambling industry analysis firm estimates that during 2004 more than 1,800 gambling websites worldwide took in \$7 billion in online wagers. This office is unable to determine North Dakota's potential portion of these wagers with any degree of accuracy.

The bill authorizes the operation of internet live poker establishments within the state and authorizes the Attorney General to adopt rules for licensure and regulation. The bill establishes a license fee for each operator of an internet live poker establishment and a \$10 annual license fee for each player. Six tax rates are established on the adjusted gross proceeds generated through an authorized establishment ranging from 8% on the first \$1 million to ¼ of 1% on any amount in excess of \$58 million. Taxes are collected quarterly by the Office of Attorney General. The bill also establishes an internet live poker proceeds fund made up of the taxes, licensing fees, and any other moneys collected, from which annual transfers are made as follows: 60% to counties for direct property tax relief, 20% to the common schools trust fund, and 20% to the general fund.

As amended, the bill will become effective if House Concurrent Resolution No. 3035 is approved by the voters. The estimated fiscal impact is shown for seven months of the 2005-07 biennium and all of the 2007-09 biennium. Meeting fees and travel expenses are added for the commission.

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

This office is unable to provide an accurate revenue forecast based on the unknown number of potential internet live poker establishments licensed to operate in North Dakota. This bill provides for annual transfers from the internet live poker proceeds fund of: 60% to counties for direct property tax relief, 20% to the common schools trust fund, and 20% to the general fund.

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line*

item, and fund affected and the number of FTE positions affected.

The general fund expenditures include salaries and wages for 2 FTE's, Commission member meeting fees and travel expenses, contractual services, vendor fees, telecommunications, computer equipment and software, and one-time start-up costs.

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

The general fund appropriation for enacting this legislation is not included in the Executive Recommendation for the Office of Attorney General's budget.

<b>Name:</b>	Keith Lauer Kathy Roll	<b>Agency:</b>	Office of Attorney General
<b>Phone Number:</b>	328-3234 328-3622	<b>Date Prepared:</b>	02/16/2005

# FISCAL NOTE

Requested by Legislative Council  
02/16/2005

**REVISION**

Amendment to: HB 1509

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Expenditures</b>	\$0	\$0	\$723,488	\$0	\$388,804	\$0
<b>Appropriations</b>	\$0	\$0	\$723,488	\$0	\$388,804	\$0

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

**2. Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

After review of research from a December 2002 General Accounting Office report entitled "INTERNET GAMBLING – An Overview of the Issues" and review of industry information, this office is unable to determine the possible revenue impact of this bill. One gambling industry analysis firm estimates that during 2004 more than 1,800 gambling websites worldwide took in \$7 billion in online wagers. This office is unable to determine North Dakota's potential portion of these wagers with any degree of accuracy.

The bill excludes internet live poker from the definition of gambling. The bill authorizes the operation of internet live poker establishments within the state and authorizes the Attorney General to adopt rules for licensure and regulation. The bill establishes a license fee for each operator of an internet live poker establishment and a \$10 annual license fee for each player. Six tax rates are established on the adjusted gross proceeds generated through an authorized establishment ranging from 8% on the first \$1 million to ¼ of 1% on any amount in excess of \$58 million. Taxes are collected quarterly by the Office of Attorney General. The bill also establishes an internet live poker proceeds fund made up of the taxes, licensing fees, and any other moneys collected, from which annual transfers are made as follows: 60% to counties for direct property tax relief, 20% to the common schools trust fund, and 20% to the general fund.

As amended, the bill will become effective if House Concurrent Resolution No. 3035 is approved by the voters. The estimated fiscal impact is shown for seven months of the 2005-07 biennium and all of the 2007-09 biennium. Meeting fees and travel expenses are added for the commission.

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

This office is unable to provide an accurate revenue forecast based on the unknown number of potential internet live poker establishments licensed to operate in North Dakota. This bill provides for annual transfers from the internet live poker proceeds fund of: 60% to counties for direct property tax relief, 20% to the common schools trust fund, and 20% to the general fund.

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The general fund expenditures include salaries and wages for 2 FTE's, Commission member meeting fees and travel expenses, contractual services, vendor fees, telecommunications, computer equipment and software, and one-time start-up costs.

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

The general fund appropriation for enacting this legislation is not included in the Executive Recommendation for the Office of Attorney General's budget.

<b>Name:</b>	Keith Lauer Kathy Roll	<b>Agency:</b>	Office of Attorney General
<b>Phone Number:</b>	328-3234 328-3622	<b>Date Prepared:</b>	02/16/2005

**FISCAL NOTE**  
 Requested by Legislative Council  
 02/15/2005

Amendment to: HB 1509

**1A. State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Expenditures</b>	\$0	\$0	\$798,442	\$0	\$388,309	\$0
<b>Appropriations</b>	\$0	\$0	\$798,442	\$0	\$388,309	\$0

**1B. County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

**2. Narrative:** *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

After review of research from a December 2002 General Accounting Office report entitled "INTERNET GAMBLING – An Overview of the Issues" and review of industry information, this office is unable to determine the possible revenue impact of this bill. One gambling industry analysis firm estimates that during 2004 more than 1,800 gambling websites worldwide took in \$7 billion in online wagers. This office is unable to determine North Dakota's potential portion of these wagers with any degree of accuracy.

The bill excludes internet live poker from the definition of gambling. The bill authorizes the operation of internet live poker establishments within the state and authorizes the Attorney General to adopt rules for licensure and regulation. The bill establishes a license fee for each operator of an internet live poker establishment and a \$10 annual license fee for each player. Six tax rates are established on the adjusted gross proceeds generated through an authorized establishment ranging from 8% on the first \$1 million to ¼ of 1% on any amount in excess of \$58 million. Taxes are collected quarterly by the Office of Attorney General. The bill also establishes an internet live poker proceeds fund made up of the taxes, licensing fees, and any other moneys collected, from which annual transfers are made as follows: 60% to counties for direct property tax relief, 20% to the common schools trust fund, and 20% to the general fund.

As amended, the bill will become effective if House Concurrent Resolution No. 3035 is approved by the voters. The estimated fiscal impact is shown for twelve months of the 2005-07 biennium and all of the 2007-09 biennium. Meeting fees and travel expenses are added for the commission.

**3. State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

**A. Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

This office is unable to provide an accurate revenue forecast based on the unknown number of potential internet live poker establishments licensed to operate in North Dakota. This bill provides for annual transfers from the internet live poker proceeds fund of: 60% to counties for direct property tax relief, 20% to the common schools trust fund, and 20% to the general fund.

**B. Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line*

item, and fund affected and the number of FTE positions affected.

The general fund expenditures include salaries and wages for 2 FTE's, Commission member meeting fees and travel expenses, contractual services, vendor fees, telecommunications, computer equipment and software, and one-time start-up costs.

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

The general fund appropriation for enacting this legislation is not included in the Executive Recommendation for the Office of Attorney General's budget.

<b>Name:</b>	Keith Lauer Kathy Roll	<b>Agency:</b>	Office of Attorney General
<b>Phone Number:</b>	328-3234 328-3622	<b>Date Prepared:</b>	02/15/2005

**FISCAL NOTE**  
 Requested by Legislative Council  
 01/18/2005

Bill/Resolution No.: HB 1509

1A. **State fiscal effect:** Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.

	2003-2005 Biennium		2005-2007 Biennium		2007-2009 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>						
<b>Expenditures</b>			\$967,270		\$375,619	
<b>Appropriations</b>			\$967,270		\$375,619	

1B. **County, city, and school district fiscal effect:** Identify the fiscal effect on the appropriate political subdivision.

2003-2005 Biennium			2005-2007 Biennium			2007-2009 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2. **Narrative:** Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.

After review of research from a December 2002 General Accounting Office report entitled "INTERNET GAMBLING – An Overview of the Issues" and review of industry information, this office is unable to determine the possible revenue impact of this bill. One gambling industry analysis firm estimates that during 2004 more than 1,800 gambling websites worldwide took in \$7 billion in online wagers. This office is unable to determine North Dakota's potential portion of these wagers with any degree of accuracy.

The bill excludes internet live poker from the definition of gambling. The bill authorizes the operation of internet live poker establishments within the state and authorizes the Attorney General to adopt rules for licensure and regulation. The bill establishes a license fee for each operator of an internet live poker establishment and a \$10 annual license fee for each player. Six tax rates are established on the adjusted gross proceeds generated through an authorized establishment ranging from 8% on the first \$1 million to ¼ of 1% on any amount in excess of \$58 million. Taxes are collected quarterly by the Office of Attorney General. The bill also establishes an internet live poker proceeds fund made up of the taxes, licensing fees, and any other moneys collected, from which annual transfers are made as follows: 60% to counties for direct property tax relief, 20% to the common schools trust fund, and 20% to the general fund.

3. **State fiscal effect detail:** For information shown under state fiscal effect in 1A, please:

A. **Revenues:** Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.

This office is unable to provide an accurate revenue forecast based on the unknown number of potential internet live poker establishments licensed to operate in North Dakota. This bill provides for annual transfers from the internet live poker proceeds fund of: 60% to counties for direct property tax relief, 20% to the common schools trust fund, and 20% to the general fund.

B. **Expenditures:** Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.

The general fund expenditures include salaries and wages for 2 FTE's, contractual services, vendor fees,

telecommunications, computer equipment and software, and one-time start-up costs.

**C. Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

The general fund appropriation for enacting this legislation is not included in the Executive Recommendation for the Office of Attorney General's budget.

<b>Name:</b>	Keith Lauer/Kathy Roll	<b>Agency:</b>	Office of Attorney General
<b>Phone Number:</b>	328-3234 328-3622	<b>Date Prepared:</b>	01/28/2005

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1509

Page 1, line 2, remove the first "and"

Page 1, line 4, after "gambling" insert "; to provide a penalty; and to provide an effective date"

Page 3, after line 21, insert:

**Penalty.**

1. Any person who willfully operates an internet live poker establishment or site without a license as required by this chapter or who willfully operates a licensed internet poker establishment or site in violation of this chapter or of rules adopted by the attorney general to implement this chapter is guilty of a class C felony.
2. Any individual playing internet live poker at any site licensed under this chapter who willfully violates this chapter or rules adopted by the attorney general to implement this chapter or who plays without first obtaining a license from the attorney general in that individual's name is guilty of a class B misdemeanor.

**Internet live poker records - Confidential.** All records and information with respect to the licensure and operation of internet live poker establishments and with respect to the identity of live internet poker players are confidential. The records and information may be disclosed within the attorney general's office or to authorized persons in the proper administration of this chapter or in accordance with a judicial order.

**SECTION 3. EFFECTIVE DATE.** This Act becomes effective on the date the secretary of state certifies to the legislative council that House Concurrent Resolution No. 3035, as adopted by the fifty-ninth legislative assembly, has been approved by the voters."

Renumber accordingly

**House Amendments to HB 1509 - Judiciary Committee 02/14/2005**

Page 1, line 2, replace "and to amend and reenact" with "to provide a penalty; and to provide an effective date."

Page 1, remove lines 3 and 4

Page 1, remove lines 6 through 17

Page 1, remove the underscore under lines 20 through 23

**House Amendments to HB 1509 - Judiciary Committee 02/14/2005**

Page 2, remove the underscore under lines 1 through 30

Page 3, remove the underscore under lines 1 through 21

Page 3, after line 21, insert:

**"Internet live poker advisory commission - Duties - Compensation - Restrictions - Penalty.**

1. The North Dakota internet live poker advisory commission is composed of five members, three of whom are selected by the chairman of the legislative council and two of whom are selected by the attorney general. The term of office is three years, expiring on December thirty-first with no more than two terms expiring in any one year. Of the first members appointed, one must be appointed for a term of one year, two must be appointed for terms of two years, and two must be appointed for terms of three years. No member may be appointed to more than two consecutive terms. Each member of the commission must be a citizen of the United States and a resident of this state. A chairman of the commission must be chosen annually from the membership of the commission by a majority of its members at the first meeting of the commission each year.
2. The commission shall meet at least once a quarter and any additional meetings as the chairman determines necessary. Special meetings may be called by the chairman upon the written request of the director or any three members of the commission.
3. The commission shall advise the attorney general in the establishment of policy for the operation of internet live poker.
4. Members of the commission who are not state employees are entitled to be compensated at a rate of seventy-five dollars per day and are entitled to mileage and expenses as provided by law for state officers and employees. A state employee who is a member of the commission must receive that employee's regular salary and is entitled to mileage and expenses, to be paid by the employing agency.
5. No member of the advisory commission or any individual residing in the same household as the member may directly or indirectly, individually, as a member of a partnership or other association, or as a stockholder, director, or officer of a corporation, have an interest in a business that contracts for the operation or promotion of internet live poker establishments regulated and licensed under this chapter. A knowing violation of this section is a class B misdemeanor.

**Penalty.**

1. Any person who willfully operates an internet live poker establishment or site without a license as required by this chapter or who willfully operates a licensed internet poker establishment or site in violation of this chapter or of rules adopted by the attorney general to implement this chapter is guilty of a class C felony.
2. Any individual playing internet live poker at any site licensed under this chapter who willfully violates this chapter or rules adopted by the attorney general to implement this chapter or who plays without first obtaining a license from the attorney general in that individual's name is guilty of a class B misdemeanor.

**Internet live poker records - Confidential.** All records and information with

respect to the licensure and operation of internet live poker establishments and with respect to the identity of live internet poker players are confidential. The records and information may be disclosed within the attorney general's office or to authorized persons in the proper administration of this chapter or in accordance with a judicial order.

**SECTION 2. EFFECTIVE DATE.** This Act becomes effective on the date the secretary of state certifies to the legislative council that House Concurrent Resolution No. 3035, as adopted by the fifty-ninth legislative assembly, has been approved by the voters."

Renumber accordingly

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1509

Page 1, line 2, remove the second "and"

Page 1, line 4, after "gambling" insert "; and to provide an expiration date"

Page 3, after line 21, insert:

**"SECTION 3. EXPIRATION DATE.** This Act becomes ineffective on the date the attorney general certifies to the legislative council that the federal government has filed an action against the state which challenges the constitutionality of this Act."

Re-number accordingly

Date: 2/14/05  
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1509

HOUSE JUDICIARY COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass as Amended & Referred to Approp.

Motion Made By Rep. Meyer Seconded By Rep. Boehning

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey		✓	Representative Delmore	✓	
Representative Maragos	✓		Representative Meyer	✓	
Representative Bernstein	A		Representative Onstad	✓	
Representative Boehning	✓		Representative Zaiser	✓	
Representative Charging		✓			
Representative Galvin	✓				
Representative Kingsbury		✓			
Representative Klemin		✓			
Representative Koppelman		✓			
Representative Kretschmar	✓				

Total (Yes) 8 No 5

Absent 1

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HB 1509: Judiciary Committee (Rep. DeKrey, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS and BE REREFERRED to the Appropriations Committee (8 YEAS, 5 NAYS, 1 ABSENT AND NOT VOTING). HB 1509 was placed on the Sixth order on the calendar.**

Page 1, line 2, replace "and to amend and reenact" with "to provide a penalty; and to provide an effective date."

Page 1, remove lines 3 and 4

Page 1, remove lines 6 through 17

Page 1, remove the underscore under lines 20 through 23

Page 2, remove the underscore under lines 1 through 30

Page 3, remove the underscore under lines 1 through 21

Page 3, after line 21, insert:

**"Internet live poker advisory commission - Duties - Compensation - Restrictions - Penalty.**

1. The North Dakota internet live poker advisory commission is composed of five members, three of whom are selected by the chairman of the legislative council and two of whom are selected by the attorney general. The term of office is three years, expiring on December thirty-first with no more than two terms expiring in any one year. Of the first members appointed, one must be appointed for a term of one year, two must be appointed for terms of two years, and two must be appointed for terms of three years. No member may be appointed to more than two consecutive terms. Each member of the commission must be a citizen of the United States and a resident of this state. A chairman of the commission must be chosen annually from the membership of the commission by a majority of its members at the first meeting of the commission each year.
2. The commission shall meet at least once a quarter and any additional meetings as the chairman determines necessary. Special meetings may be called by the chairman upon the written request of the director or any three members of the commission.
3. The commission shall advise the attorney general in the establishment of policy for the operation of internet live poker.
4. Members of the commission who are not state employees are entitled to be compensated at a rate of seventy-five dollars per day and are entitled to mileage and expenses as provided by law for state officers and employees. A state employee who is a member of the commission must receive that employee's regular salary and is entitled to mileage and expenses, to be paid by the employing agency.
5. No member of the advisory commission or any individual residing in the same household as the member may directly or indirectly, individually, as a member of a partnership or other association, or as a stockholder, director, or officer of a corporation, have an interest in a business that contracts for the operation or promotion of internet live poker

establishments regulated and licensed under this chapter. A knowing violation of this section is a class B misdemeanor.

**Penalty.**

1. Any person who willfully operates an internet live poker establishment or site without a license as required by this chapter or who willfully operates a licensed internet poker establishment or site in violation of this chapter or of rules adopted by the attorney general to implement this chapter is guilty of a class C felony.
2. Any individual playing internet live poker at any site licensed under this chapter who willfully violates this chapter or rules adopted by the attorney general to implement this chapter or who plays without first obtaining a license from the attorney general in that individual's name is guilty of a class B misdemeanor.

**Internet live poker records - Confidential.** All records and information with respect to the licensure and operation of internet live poker establishments and with respect to the identity of live internet poker players are confidential. The records and information may be disclosed within the attorney general's office or to authorized persons in the proper administration of this chapter or in accordance with a judicial order.

**SECTION 2. EFFECTIVE DATE.** This Act becomes effective on the date the secretary of state certifies to the legislative council that House Concurrent Resolution No. 3035, as adopted by the fifty-ninth legislative assembly, has been approved by the voters."

Renumber accordingly

2005 HOUSE APPROPRIATIONS

HB 1509

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1509  
Live Poker

House Appropriations Full Committee

Conference Committee

Hearing Date February 15, 2005

Tape Number	Side A	Side B	Meter #
2	X		#4.6 - #14.0
Committee Clerk Signature <i>Chris Alexander</i>			

Minutes:

**Rep. Ken Svedjan, Chairman** opened the discussion on HB1509.

**Rep DeKrey** explained that he disagreed that there needs to be a fiscal note on this bill. The essence of this bill is that this issue goes to the vote of the people which won't take place until June and the bill goes away if the people don't pass the constitutional amendment. The effect of the fiscal note will not happen until the next biennium.

**Rep DeKrey** commented that the new fiscal note has over \$700,000 in revenues. This bill licenses and regulates live Internet poker. This is something that is happening off shore right now and they are looking for a state to move on shore. He explained that the people will not vote on this until June, if it is passed here. If it does not pass the vote of the people in June, then there would be no need for the money.

**Rep. Mike Timm, Vice Chairman** asked about the split vote of 8-5 in the committee.

**Rep DeKrey** answered that this is a unique concept and some people thought this to be an expansion of gaming. The majority of the people felt that it wasn't because it happening already offshore. There are other states looking to bring this on shore. There are up to 29,000 tables being played at any given time on this system now. They are clearing \$13 million per day on these sites. If we licensed and taxed this it would be a huge financial plus for this state.

**Rep. David Monson** asked who wrote the fiscal note.

**Rep Dekrey** answered that it was from the Attorney General's office. They based it on estimates on the number of the people playing and the \$10.00 fee for licensing.

**Rep. Francis J. Wald** asked why it was being done off shore.

**Rep DeKrey** answered that they take it off shore because you can then use real money.. You set up accounts with electronic transfers. Coming on shore will add legitimacy to the game because there are people that will not play now because they will not send there money off shore someplace. Payments are made to winners through electronic transfers.

**Rep. Jeff Delzer** asked about the status on HB3035

**Rep DeKrey** answered that it would be heard in constitutional revision today.

**Rep. David Monson** asked if the Bank of North Dakota would handle this

**Rep DeKrey** answered yes, this has been mentioned as the depository for the funds. (meter Tape #2, side B, #9.8)

**Rep. Francis J. Wald** moved a Do Pass motion on HB1509.

**Rep. Blair Thoreson** seconded.

**Rep. Jeff Delzer** stated that he would oppose the bill because he believed it was an expansion of gaming and it would be a major change in policy.

Page 3

House Appropriations Committee

Bill/Resolution Number HB1509

Hearing Date February 15, 2005

**Rep. Ken Svedjan, Chairman** commented that he would support the bill because he believed the policy discussion on this should be heard on the House floor

**Rep. Ken Svedjan, Chairman** called for a roll call vote on the Do Pass motion for HB1509.

Motion failed with a vote of 10 yeas, 11 neas, and 2 absences.

**Rep. Francis J. Wald** moved a Without Recommendation motion for HB1509.

**Rep. Ron Carlisle** seconded

**Rep. Ken Svedjan, Chairman** called for a roll call vote on the Without Recommendation motion for HB1509. Motion carried with a vote of 14 yeas, 7 neas, and 2 absences. Rep Kretschmar will carry the bill to the house floor.

**Rep. Ken Svedjan, Chairman** closed the discussion on HB1509.

Date: February 15, 2005  
Roll Call Vote #: 2

**2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. HB1509**

House Appropriations - Full Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken **WITHOUT RECOMMENDATION**

Motion Made By **Rep Wald** Seconded By **Rep Carlisle**

<b>Representatives</b>	<b>Yes</b>	<b>No</b>	<b>Representatives</b>	<b>Yes</b>	<b>No</b>
Rep. Ken Svedjan, Chairman	X		Rep. Bob Skarphol		X
Rep. Mike Timm, Vice Chairman	X		Rep. David Monson	X	
Rep. Bob Martinson	X		Rep. Eliot Glassheim	X	
Rep. Tom Brusegaard	AB		Rep. Jeff Delzer		X
Rep. Earl Rennerfeldt	X		Rep. Chet Pollert	X	
Rep. Francis J. Wald	X		Rep. Larry Bellew		X
Rep. Ole Aarsvold		X	Rep. Alon C. Wieland	X	
Rep. Pam Gulleason		X	Rep. James Kerzman		X
Rep. Ron Carlisle	X		Rep. Ralph Metcalf	X	
Rep. Keith Kempenich	X				
Rep. Blair Thoreson	X				
Rep. Joe Kroeber	AB				
Rep. Clark Williams	X				
Rep. Al Carlson		X			

Total Yes 14 No 7

Absent 2

Floor Assignment **Rep Kretschmar**

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)  
February 15, 2005 2:13 p.m.

Module No: HR-30-2999  
Carrier: Kretschmar  
Insert LC: . Title: .

**REPORT OF STANDING COMMITTEE**

HB 1509, as engrossed: Appropriations Committee (Rep. Svedjan, Chairman) recommends **BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION** (14 YEAS, 7 NAYS, 2 ABSENT AND NOT VOTING). Engrossed HB 1509 was placed on the Eleventh order on the calendar.

2005 SENATE JUDICIARY

HB 1509

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1509

Senate Judiciary Committee

Conference Committee

Hearing Date March 8, 2005

Tape Number	Side A	Side B	Meter #
1	X		0.0 - End
		X	0.0 - End
Committee Clerk Signature <i>Mona L Solberg</i>			

Minutes: Relating to Internet Gambling.

**Senator John (Jack) T. Traynor**, Chairman called the Judiciary committee to order. All

Senators were present. The hearing opened with the following testimony:

**Testimony In Support of the Bill:**

**Rep. Jim Kasper**, Dist. #46, Introduced the bill and format for hearing.

**Rep. Mark Dosch**, Dist. #32 - Sited how in SD they were the first to utilize the removal of limits on usury rates. They are set by law for the credit card companies to set the limit that they can charge over for interest rates. SD took the bold step when interest rates were rising to eliminate this law. At that time the consumers were thinking "what is the legislature doing?". They had the foresight to see down the road. As a result they became the location for credit card companies. The rates did not go overboard, they stayed competitive. This step brought a lot of economic development to the state. Today I think we have the same in front of you with 1509. To make a change to allow Internet poker to come to the state. This will allow the state future

growth. I signed on to the bill because Internet poker is not new. It is here to stay. **Sen. Kasper** will show us by pulling up a game right hear. You can sign in and play. It is here to stay. Our question is do we want something that is hear that unregulated. Currently it is offshore. I am on this bill so we can regulate this industry.

**Rep Dave Weiler**, Dist. #30 Sited his support (meter 502) You will hear a lot of numbers today. This is not an expansion of gambling. It is not. This will bring us jobs and Internet growth. We are not bringing "gamblers" to ND.

**Rep. Blair Thorson**, Dist. #44 gave his support. (meter 600) I was skeptical when I signed on this bill then I realize that with out regulation these things are happening now. Why not regulate and not only protect the people around the country, but the people of ND also. They are playing it in ND now with no protection. Passing this will protect them and make money for the state in the process. We will not be "bamboozled" as the paper says. You will be asking the tough questions that I have done and I hope you do and get the answers that like me satisfied them.

**Rep. Ron Iverson**, Dist. #27, gave his support (meter 800) This is an opportunity. It is very good for the state. We can pass this legislation, put it before the people of ND to vote, and let these people come here and bring economic development to the state or choose not to. My constituents biggest concern is property taxes and this bill is a way to lower them.

**Rep. Andy Maragos**, Dist. #3 "Dr. Lotto" (meter 900) While I am not a sponsor for this bill I support it. Sited a case whether the liability law had to be changed so that an aircraft industry could come to the state. As policy makers we have to think out of the box to improve our state and make things that we can do in the state. This holds great potential for this state. Let us put this before the people to vote.

**Rep. Kasper, Dist.** Where did this bill come from (meter 1000) Sited a Poker Players win. Told childhood story. Discussed his Lake Home in MN's near a gaming casino. Found Card Player Magazine subscription. Representative of the industries want to regulate the game. Our jobs is to bring economic development to the state. Sited his relationship to the industry and how they want to be regulated. Your will here that ND will be sued by Federal Court and you will here some of the best attorneys in the state dispute this. Discussed what type of people this will bring to the stated. Introduced the key speakers: Att. #A.1 with Biography Att. #A2. Rep. Kasper also submitted an amendment - Att. #1 Sited that the people of the state should be given the revenue in a refund 60% goes to Poly Sub and 20% back to the county for Education in the Mill Levy to Property Taxes- refer to amendment. Sited his "golden goose" scenario. (meter 1520) Discussed House Concurrent Resolution 3035 as also part of the bill. Continued his review of the bill, highlighting what he supports and does not support of the industry. Detailed the licensing process and the user fee process. Tax scheme would be 8% for the first \$ million, 6% for the second, 4% on third \$ million 2%. Largest poker sites makes revenues over a billion dollars a year and are considering a public offer of 4 billion to go public. Customer list will be protected. Sen. Traynor asked for a review of the bill and the concurrent resolution. Rep. Kasper concluded that the bill will not be a law until it goes before the "vote of the people" and described how the two bills work together.

Sen. Nelson asked how his % of his taxing scheme were derived? I made them all up.

On line 19 "and other moneys collected" ? This would be application fees etc. The industries generate there own revenues to process background fees. Sen. Nelson has an issue on the appropriation portion of the bill. We have received a very large fiscal note with no revenue

stated on it- over a million dollars with no revenue coming in. I am sure that that is not in the A.G.'s budget for this biennium, how do you propose to budget this. Rep. Kaspers responded that when this type of businesses have started off shore they will be addressed in the AG's amendments. How do you predict a revenue that we have no experience with? I think the note is unfair. There will be no expense till they come to ND. They also discussed the experience of the appointed commission. 3 by legislative council chair and 3 by A.G.'s office.

**Senator Triplett** asked for more details on the "jobs" this will create for ND? He referred to bottom of page 1. A.G.'s license process intends that the industry must license, locate, bringing there hardware, software and operators to ND. You may clarify it.

**Sue Schneider** - River City Group St. Charles, Missouri - See Bio Att. #A2 (meter 35000) Gave presentation - Att. #2 Currently 8 forms of Internet gaming products: lottery, racing, casino games, sports betting, bingo, poker, betting exchanges, as well as skill games like backgammon. Australia - Regulatory Structure through state acts called Player Protection Act.

Europe - Offer gaming products directly to residence through licenses private companies. Rigid regulatory structure for sports books and looking into licensing for casino operators

Caribbean - Attempting to regulate.

Mohawk reserve in Canada.

US only horse racing - CA or Oregon.

**Elizabeth George** - North America Training groups wanted to attend and could not due to hearing time change. Please contact some one like her to help with the negative issues.

The main reasons governments have proceeded on this legislation is for player protection not only money. Biggest issues are where the player is and were the provider is

Page 5

Senate Judiciary Committee

Bill/Resolution Number HB 1509

Hearing Date March 8, 2005

**Michael Corfman** - Casino City, Inc. Boston, Mass - See Bio A2, (meter 4900) Gave Testimony

- Att. #3. Casino City Press-CEO. Monitor size and growth of all facets of the industries. Shared his finding-referring to bar graphs. Monitored visits to poker sites. Provide gaming info to users on the web. 1 million visits a month with 500 thousand newsletter members. Goal for sites is information to customer that they can get the "best value" for there recreational gaming dollar. We act as advisors. Player want an engaging, enjoyable environment, good services and to feel safe that they will not be abused. Some want consistency, some not.. Our 500% growth rate would be an advantage to ND do to players who like US regulatory standards. Players prefer to by American if they are from America. 70% of our users are from the US and we will promote this site here in ND. We are a "good guide" business.

**Mr. Nigel Payne** - Paradise Poker, London, England - See Bio Att.#A2. (meter 5760) Gave Testimony - Att. #4

**Frank Catania** - Former NJ gaming regulator, New Jersey - See Bio - Att #A2 (meter 2441) Gave Testimony - Att. #5.

**Patric O'Brien** - Attorney, Greengurg Turiug, FL - (meter 3646) Att. #6.

**Allyn Jaffrey Shulman** - Attorney & Player, California (meter 5262) Att. #7. The reason this has not passed in other states is that the legislatures tried to amend the wire act to specifically add the words 'online poker'. Currently it does not say it. Owner of Gambling Magazine, "Card Player". Many adds with sites of online poker sites, these are well known advertisements. Discussed fear of being cheated by the un-regulation of game. The issue is not weather online poker can be stopped. It can't-it is already thriving, our citizen and the citizens of ND are playing it. We only want to make sure it is regulated.

**Mr. Peter Friedman**, CPA New Hampshire (meter 230) Employment will come to state.

Management, accountants, and legal accountant. 400-600 people playing needs one technical engineer and three programers, 15 customer service representatives. This is only one sites eternal companies. Other Attorneys and accountants would come to the state. This will increase restaurant businesses etc. Sited the North Dakota Banks possibility of \$500 Million worth of deposits into the bank. What would this do to the banks lending policies!

**Testimony in Opposition of the Bill:**

**Mr. Warren DeKrey**, ND Council on Gambling Problems (tape 2, side 1, meter 452) Att. #8

Asked people in room to stand who were against the bill. Approximately 25 people stood.

**Dick Elefson**, LAC LSW, - Submitted Testimony - Att. #9

**Senator Triplett** asked if Mr. Elefson is actually making the case for the bill testifying that it is already going on and is unregulated. Maybe we should regulate it and collect the tax dollars for it, using the funds to help folks who are trying to help the people with the problem? Which he responded that the bill would greatly expand and enhance the opportunity for folks to gamble.

Sited an incident where a 17 yr. ran up fathers credit card. **Sen. Trenbeath** asked for suggestions on how we can control this is we do not regulate it? We need to educate and be role models. We already have regulations for alcohol that we can enforce. If we do not regulate this how can we enforce it.

**Bishop Bob Linning** - Past Bishop of Evangelical Church of Western ND. I am against the expansion of gambling. I have yet to see any long term economic benefit creating new wealth for our state or communities. Gambling promotes untruths that an individual can get something for nothing. To do so at the costs of the neighbors. Costs society more then it generates.

Responsibility to respect each other. This bill is a step backwards for our state of good work ethics. **Sen. Trenbeath** stated that while he agreed with all the bishop says how would regulating it be a bad thing? Not to have the bad thing to begin with it. Debate of doing nothing vs. regulating.

**Gov. Arthur A. Link** - Former ND Gov. Att #10 - Article. (meter 2895) Concerns of this being a signal if we adopt bill to the rest of the Senate. Next session it will be slot machines on the Internet. The benefits explained are not as they appear, like race horse gambling and its costs. I fear that this will open the door to the expansion of gambling on the Internet. This will open up the gambling flood gates. They will say 'what is fair for the Internet poker is fair for us'. The rules themselves indicate the fragile issues around this bill. In the early economic and political days the bank of ND was organized as a revolution bank not to be used for this! This is not what the originators of the bank had intended the use of! This is to great of a risk to recommend to the people of ND. One mark against the bank would make history across the state!

Reading of the Purpose of the State Bank of ND Sec.. 1 (meter 3720) An Act Declaring the purpose of the state of ND to engage in the banking business, establish a system of banking under the name of the Bank of ND. Operated by the state and the defining the scope and the manor of its apportion and the powers and the duties of the person charged with its management making an appropriation; therefore and providing penalties for the violations of certain provisions Sec. 1 for **the purpose of promoting and encouraging agricultural**, commerce and industry the state of ND shall engage in the business of banking and for that purpose shall, and does hear by establish a system of banking owned controlled and operated by it under the name of the Bank of ND.

**Mike Seminary Dist #35**, I am opposed to this bill (meter 3993) I am a typical person who lets what goes on here generally pass me by. Why I am here today is because I heard that this was not considered "gambling". I am perplex. I am not sophisticated and intelligent or articulate as some of our distinguished guest on the other side. Gambling in the dictionary is defined, "when you are engaged in an act of wagering on anything that has an uncertain outcome." This tweaked my curiosity on this issue before us. This is why I am here today. As a citizen of Bismarck, for six years I have been involved with the United Way, four as a board member. Every year we go through an allegation process of dispersing funds into the different agencies. One of main reasons for personal bankruptcy being up is credit card debt. Gambling is a huge contributor to this problem. In the Bis. Man Develop meeting, I heard a person say how one child goes to young life and the other goes to play "Texas holdem" at another friend. You turn the TV on and you can always find "Texas Holdem". Once we condone it, it will only get worse. With the ease and access of credit card use and the popularity of the game, this is not the door that we want to open to our youth. This bill is about State Endorsed gambling and we do not want to use the bank of ND to go any further down that road.

**Pastor Bob Norval** - Head of Staff at Charity Lutheran Church, Chaplain with the Heart View Foundation, Bis. In the Bis Tribune they have tried to encourage us to view this as a "new sport" demanding skill and a little luck. Sited cases in life of early lessons involving alcohol and gambling. This is titillating and exciting to think of a half of million coming into the state with this, but have we thought through what the costs will be? I live in ND for the reasons this bill goes against. You say that we need to pass this so we may regulate the problem do we not have systems in place to already do this? In the legal and judicial system we have many resources to

work on process to help us control the issues. This bill will not. The Internet has to many other unregulated issues that we can not control. While this bill would bring much regulation it can only do so much. Sited capital expenditures of gamblers in ND is \$400 per year.

**Senator John T. Traynor**, Chairman asked to hold feather speakers so that the Judiciary committee members may ask questions of the speakers:

**Sen. Trenbeath** stated with respect to Nevada's law what year did they pass it and why haven't they implemented it? Mr. O'Brian stated 2001. Siting that in the law they stated the approval of the Justice Departments to make sure there law was consistent. The Justice department did not think it was. It is not the Justice department by statute is not to provide opinion to outside only within government and with in court. Spoke of violation of wire act. **Sen. Trenbeath** wondered why Nevada, a leading state in gambling, and many other things, first passes a law requiring Justice Dept.'s approval and second after the opinion of the Justice Dept. would not go any further. It is not reve lent if the Justice Department was correct or not. They did not go through with the act. Why is the Bank of ND unique for you? We have many state chartered banks? The bank of ND is not essential to this bill. If you choose to bring the bank of ND into the mix. This is independent of your decision to regulate this industry. You would be able to regulate the industry better due to being a state in control of the bank directly and it would give the state additional income. **Sen. Trenbeath** asked if ND were to go forward on this, aside from all the litigation's and gray areas, and we were successful, what would keep the other states from coming into the competitions with us. **Mr. Payne** responded that you would have to contract mandating with the companies to stay in ND for, example a minimal of, five years. If you regulate other

states will follow. The state bank of ND would give people an additional reason to stay in ND.

Other states are considering this but most are not as far as you in the process.

Senator Hacker stated ND infrastructure of communication lines and the location of this industry in rural areas, how will our lack of it and another's states already existing communication infrastructures not make businesses preference to go to another state? It would cost Billions of dollars to go beyond the T3 lines? Nigal responded that the bandwidth infrastructure is a satelight system. The state could apply for this tomorrow and be set up with a minimum costs. Regulatory body and setup would be covered by the industry. Discussed the "nonrefundable" set up fees charged to the companies who want to do business and they are used to it. Discussed third party involvement

Senator Triplett asked for clarification of adjusted gross proceeds (meter 392) When a game takes place an operator earns money in two ways; tournament entry fee and ring games.

Senator Triplett questioned how you would stop a situation of a child using up a parents credit card to a bill of \$8,000 in one night. Mr. Payne responded that in most games they regulate a \$500 cap per day. The problem that happened in the above situation was an unregulated company. The legitimate companies will squeeze out the unregulated companies due to the fact that people prefer to go to a regulated site. Sited how tobacco sales on the Internet regulates age.

**Rep. Kasper** stated for five minutes how hard he would work not to let any other form of gambling into the Internet.

Testimony if Opposition to Bill

**Dr. Marlin Johnson**, Semi retired physician of 52 yr., Bismarck (meter 1225) Tribune article stating the out of state experts saying that gambling is a "game of skill" and "some folks make a

living at it". This is the heart of the problem. The living is made by the professional and the average Joe is the one who helps him make that living. In my retirement I have been involved with organizations for many programs with youth. This is an addictive for of entertainment. I am concern of the violation of Federal Law. Gambling's success is its appeal to getting money from nothing. While you look at this as a way to get money, the people you get this from are the same people you would tax anyway, minus what the professionals skim off, advertising and cost of operations. More losers then winners.

**Christina Rondo** - ND Family Alliance (meter 1428) In opposition. Welcome to the state, this is an interesting discussion. I am gravely concerned as a citizen and representation of the citizens of the state; anything that bears the stamp of stated endorsement legitimizing the idea, issue, or industry such as this. This would only serve to greatly expand gambling here and across the US. Many are waiting for the endorsement before they "flock" to this state. Quote "If gambling were a children's toy it would be pulled off the market immediately" we would not tolerate it. As a parent to be it scares me as an unregulated industry. This bill does not address a true regulation of the industry. There is too much money tied to it. All this money seems suspicions and creates the illusion of conflict of interest. Nine areas of gambling social costs: Crime, Business and employment costs (lost productivity, time,,) Bankruptcy, Suicide, Illness Social Service Costs, Direct Regulatory Costs, Family Costs (divorce, separation, spouse abuse and child neglect) Abused Dollars. Please keep in mind the best interest of the citizens of ND beyond the economic income of the dollars.

**Lynn Burgman** - Dist. #32 Residence (meter 1865) As a card caring republican I am glad to see the former Gov. Link here today. He warned us this day would come and it has. We teach our

children to abide by the law and we are contemplating ignoring what the Justice Dept. is telling us to do. Sited a Frontline TV show it exposed how SD was persuaded to come to SD on its usury laws. The companies came in and built the buildings. They came back a few years later and interview the Gov. who allowed this and his response was "how different he would do things knowing what he knows now"! We do not want ND to be the next "Vegas"

Shelly Trainer - As a wife and mother of three daughters and a member of Bismarck. Integrity and gambling do not coincide. Integrity is how we act in public, what you say in person, and how you think in private are all the same. I do not see the "integrity of Internet poker" as the same as the "integrity of ND".

**Mr. O'Brian** stated (meter 2230) the Dept. of Justices letter. Five Courts have ruled the wire act does not cover non sports gambling. No courts have ever ruled that it has ever covered non sports gambling. The Internet gambling has existed for ten years, the Justice Dept. has said that it is illegal and a violation to the wire act but has not prosecuted one case of non sports gambling. Though they have been strong on making there assertion the courts do not agree with them and they have not shown any willingness to take them to court. I do not think that there is any substance behind the letter.

**Senator Syverson** asked what the status of Nevada Law currently? They passed the law they authorized it subject to conformation from the Dept. of Justice. The conformation was never obtained so they can not move forward. If you move forward, they can not due to the fact that they would have to amend there law stating the requirement of the Justice Dept.'s approval.

**Rep. Kasper** made closing comments (meter 2464) Thanking committee for there time.

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Senate Judiciary Committee

Bill/Resolution Number HB 1509

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**Sen. Nelson** asked with all the time and money to set the projector and screen set up, what was it for? Rep. Kasper could not get his site to work so they did not use it.

**Senator John (Jack) T. Traynor**, Chairman closed the Hearing

**Other Attachments:** Letter from The U.S. Deptment of Justice, Criminal Division - Att. #11

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1509

Senate Judiciary Committee

Conference Committee

Hearing Date March 9, 2005

Tape Number	Side A	Side B	Meter #
1	X		5050 - End
			0.0 - 4190
Committee Clerk Signature <i>Maria L Solberg</i>			

Minutes: Relating to Internet Gambling \*

**Senator John (Jack) T. Traynor**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

**Testimony In Support of the Bill:**

**Bob Bennett**, Attorney General's Office (meter 5350) Submitted an amendment Att. #1. Sited that the Attorney General has no official position on this bill. The amendments are submitted as a neutral position and are provided to the committee for technical assistance. The office had a long meeting with the sponsor and the poker representatives. If the bill passed and if the constitutional amendment passes we would have a frame work to begin the process. We had to make sure we had enough authority to do what we had to do in the adoption of rules and pursue it. This is what the amendments do. We borrowed most of the language from the lottery law, that has worked well. In our meeting of the two groups the poker representatives wanted to leave it as general as possible leaving the Attorney General "general" authority to get the bill in place,

Page 2

Senate Judiciary Committee  
Bill/Resolution Number HB 1509  
Hearing Date March 9, 2005

but we can not do that. We have to work within a certain structure for administrative rule to make sure we have the authority. **Mr. Bennett** reviewed the amendment. The committee discussed the licensing fees. We can not provide a \$10 license fee to each player, that would be too expensive for us to do. If we wanted to deny a person from playing then we would be under obligation to give them a hearing and \$10 would not cover that. What I suggested was that the "licensee" have a "user fee" collected by the licensee from every player and then they would be responsible to pay it to the state. This would make them responsible to take the fee, collect all the Identification or all other requirements to prevent someone who is under 18 from playing. This would give the burden to the licensee. They would pay a \$25,000 non refundable application fee The Attorney General is not in the position of siting the dollar amounts.

**Jim Kasper** sited that he would like to see also a 25,000 ongoing annual licensing fee. The committee discusses changing the application fee to \$50,000

**Sen. Nelson** sited that the license qualification should be under subsection 1 and 5, you say.. a person "must" "if"... (meter 849) sited confusion with the clarity of statement.

**Mr. Bennett** discussed the location of the businesses being in ND. The concern is that not all business would be transacted in the state. The banks or main offices could even be in another country. Discussed that our law for character or a crime may not be the same law as someone who plays from another state but they could be from another country. Discussed costs if the A.G.'s office may have to go to another country. Even if they reside in another country they must follow ND law.

**Senator Hacker** questioned why a company with an existing infrastructure would want to leave everything to come to ND with no infrastructure.

**Rep Kasper** sited that the intent of the bill is that all parts of the business would be located in ND, including all there servers and physical entities be located in this state. Senator Hacker stated that the this is all word of mouth only, it does not state this on the bill. (meter 1650).

**Senator Syverson** sited that the equipment needs to be in physically in ND. Is the movement of the attributes of a company a statutory process or can the Attorney Generals office make the rules? **Mr. Bennitt** responded that we could not mandate by rule the location of a company. We can, as in gaming, mandate they only bank in ND financial institutions that have under our general record keeping. All records would have to be located in ND (discussion 1846) Sited difficulties in mandating servers only being in ND.

The committee discussed that the State of ND tax payers should not be stuck with any "start up" fees. Discussion of the expenses incurred even before the application fees were collected (meter 2400). Discussed the ability to accept "grant" money to help defer these costs.

**Rep Kasper** sited that the poker industries would like some sort of offset from all these fees perhaps prorated one or two years down the line. (meter 2847)

### **Testimony in Opposition of the Bill**

**Senator John (Jack) T. Traynor**, Chairman closed the Hearing

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Senate Judiciary Committee  
Bill/Resolution Number HB 1509  
Hearing Date March 9, 2005

Carrier:

**Senator John (Jack) T. Traynor**, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1509

Senate Judiciary Committee

Conference Committee

Hearing Date March 14, 2005

Tape Number	Side A	Side B	Meter #
2	X		0.0 - 4958
Committee Clerk Signature <i>Maria L Solberg</i>			

Minutes: Relating to Internet Gambling.

**Senator John (Jack) T. Traynor**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work

The committee was handed out two amendments. The first - Att. #1 was from the Attorney Generals Office dated March 14th. Vonnett Richtor reviewed the amendment with the committee.

**Sen. Traynor** handed out a second amendment - Att. #2 (50295.0403) and the committee reviewed them.

**Sen. Trenbeath** asked if the Attorney General had input with the legal defense fund? He did not favor it. He is certain that there will be litigation with the bill. **Sen. Traynor** continued with his amendment: This provision would be funding for this. He did not want funding from outside due to it being the states responsibility to defend the bill. This would provide that it comes from the proceeds. **Senator Syverson** discussed the profiling system referred to in section 1 on his

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Senate Judiciary Committee

Bill/Resolution Number HB 1509

Hearing Date March 14, 2005

amendment. (meter 460) Discussion of the effective date, of a gift/grant fund coming from the one time non refundable application fee.

**Rep. Kasper** was asked how he viewed the two amendments. They spoke of the funding and how the original intent of the bill was to take some of the profits to go back to the people to lower there property taxes.

Opinion Letter - Att. #3 Catania & Assoc. LLC and Att. #5 Greenberg Traurig

Discussion (meter ) of the provision of acceptance of a grant. The concern is when a grant is provided you usually have to do something for this. The AG.'s office will dictate only to themselves. **Senator Hacker** was concerned about the wire act. Talked in detail about the act.-

Att. #4

**Senator Triplett** made the motion to DO Pass the amendment from the A.G.'s office dated March 14th and **Sen. Trenbeath** seconded the motion. All members were in favor and motion passes.

**Sen. Trenbeath** made the motion to Do Pass Amend 50295.0403 and **Senator Hacker** seconded the motion. All members were in favor and motion passes.

The committee requested that all amendment acted on be combined into one for clarification.

**Other:** Article from the New York Times submitted. - Att. #6

**Senator John (Jack) T. Traynor**, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1509

Senate Judiciary Committee

Conference Committee

Hearing Date March 15, 2005

Tape Number	Side A	Side B	Meter #
1	X		0.0 - 2560
Committee Clerk Signature <i>Maria L Solberg</i>			

Minutes: Relating to Internet Gambling - Poker.

**Senator John (Jack) T. Traynor**, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

**Testimony In Support of the Bill:**

**Governor Link**- Former ND Governor spoke on behalf of Warren DeKrey, Chairman of the ND Council on Gambling Problems. (meter 90) Gave Testimony - Att. #1

Handed out the combined amendments (50295.0404) - Att. #2 for the committee to review and discuss.

**Senator Hacker** asked the Governor if the funds for the council were funds received from the proceeds of the selling of lottery tickets through the Human Services Department? No they are all privately donated funds we are separate.

**Sen. Traynor** sited that no action being taken on the bill unless the entire committee was present.

Page 2

Senate Judiciary Committee

Bill/Resolution Number HB 1509

Hearing Date March 15, 2005

**Sen. Trenbeath** does not like on the top of page 4, the use of "may not" prefers "shall not". He decided that this language is correct. This is probably standard language in a prohibition.

General discussion of a review of the amendment. **Sen. Nelson** stated how the "kids games" change so often that if we go into our constitution and name a game this could get complicated. The committee discussed Rep. Kaspers amendment as it relates to the original bill. The change would be the "tax money" on the industry would not go to the common school trust fund - Levy Tax and be a direct to the school districts direct property tax relief (Amendment .0402) (meter 1600) Did not want it the principle to be spent by the school trust fund.

**Sen. Trenbeath** made the motion to Do Pass the top of amendment 50295.0402 dated March 7

**Sen. Nelson** seconded the motion and the vote was held for **Senator Triplett** to be present.

**Senator John (Jack) T. Traynor**, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1509

Senate Judiciary Committee

Conference Committee

Hearing Date March 16, 2005

Tape Number	Side A	Side B	Meter #
3	X		1270 - End
Committee Clerk Signature <i>Mario L. Salber</i>			

Minutes: Relating to Internet poker

**Senator John (Jack) T. Traynor**, Chairman called the Judiciary committee to order. All

Senators were present. The hearing opened with the following committee work:

**Sen. Trenbeath** made the motion to do pass amendment .0405 and **Senator Hacker** seconded the motion. All members were in favor and the motion passes

The chairman requested that legislative council put the amendment into the bill form for the committees clarity and the committee would convene at that time.

**Senator John (Jack) T. Traynor**, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1509

Senate Judiciary Committee

Conference Committee

Hearing Date March 18, 2005

Tape Number	Side A	Side B	Meter #
1	X		0.0 - End
Committee Clerk Signature <i>Mario L Solberg</i>			

Minutes: Relating to Internet Poker

**Senator John (Jack) T. Traynor**, Chairman called the Judiciary committee to order. All

Senators were present. The hearing opened with the following:

**Sen. Traynor** made the statement that the Justice Departments letter does not compel him to believe that the US Court of Appeal ruling in regards to the wire act that it would not prohibit the Internet poker activity - Att. #1

The committee discussed how the industry cry's out for legislation. Concerns for addicts and the other issues this game involves.

**Kathy Roll**, Office of the Attorney General, Introduced a letter - Att. #2

**Sen. Trenbeath** made the motion to DO NOT PASS the engrossed bill and Senator Hacker seconded the motion The committee was spit. Yes: **Senator Hacker Sen. Trenbeath and Sen.**

**Nelson** No: **Sen. Traynor, Senator Syverson and Senator Triplett.**

Motion Fails

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Senate Judiciary Committee

Bill/Resolution Number HB 1509

Hearing Date March 18, 2005

**Senator Syverson** made the motion to DO Pass and **Senator Triplett** seconded the motion. The committee was split. No: **Senator Hacker Sen. Trenbeath and Sen. Nelson** Yes: **Sen.**

**Traynor, Senator Syverson and Senator Triplett.**

Motion Fails

**Senator Syverson** made the motion to pass without committee recommendation and **Sen.**

**Trenbeath** seconded the motion all members were in favor and the motion passes.

Carrier: **Sen. Traynor**

**Senator John (Jack) T. Traynor**, Chairman closed the Hearing



PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

Page 1, line 2, after the first semicolon insert "to amend and reenact section 50-06-22 of the North Dakota Century Code, relating to the compulsive gambling prevention and treatment fund;" and after the second semicolon insert "to provide a continuing appropriation;"

Page 1, after line 4, insert:

**"SECTION 1. AMENDMENT.** Section 50-06-22 of the North Dakota Century Code is amended and reenacted as follows:

**50-06-22. Compulsive gambling prevention and treatment fund - Continuing appropriation.** Funds deposited in the compulsive gambling prevention and treatment fund under section 53-12-21 and section 2 of this Act are appropriated to the department on a continuing basis for the purpose of providing the services under section 50-06-21."

Page 1, underscore lines 7 through 24

Page 2, underscore lines 1 through 20

Page 2, after line 20, insert:

**"Internet live poker surcharge - Attorney general legal defense fund - Continuing appropriation.** A five percent surcharge is imposed on the adjusted gross proceeds of each establishment authorized to conduct internet live poker under this chapter. The licensed internet live poker establishment shall remit the surcharge to the attorney general on a quarterly basis. The attorney general shall remit the surcharge to the state treasurer for deposit in the attorney general legal defense fund. The moneys in the fund are appropriated on a continuing basis to the attorney general for the purpose of funding legal services to defend legal challenges to the live internet poker established under this chapter. The surcharge imposed under this section must be suspended upon notification by the state treasurer to the attorney general that the balance in the attorney general legal defense fund has exceeded two million dollars. The attorney general may reinstate the surcharge if the balance in the fund is less than two million dollars."

Page 2, underscore lines 21 and 22

Page 2, line 23, underscore "any other moneys collected under this chapter.", replace "Annually, all" with "The attorney general shall transfer twenty-five thousand dollars per quarter from the internet live poker proceeds fund to the state treasurer for deposit in the compulsive gambling prevention and treatment fund under section 50-06-22. The total amount transferred under this section to the compulsive gambling prevention and treatment fund may not exceed two million dollars. All remaining", and underscore "moneys in the fund must be"

Page 2, underscore lines 24 through 31

Page 3, underscore lines 1 through 31

Page 4, underscore lines 1 through 20

Renumber accordingly

Date: 3/14/05  
Roll Call Vote #: 2

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1509

Senate Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Traynor Amend. 50295.0403

Motion Made By Senator Trenbeath Seconded By Senator Hacker

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) \_\_\_\_\_ 6 No \_\_\_\_\_ 0

Absent \_\_\_\_\_ 0

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

*Adopted ahead*

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

Page 1, line 2, after "poker" insert "; to provide a continuing appropriation"

Page 2, line 4, replace "The program must include a license fee for each" with "Each"

Page 2, line 5, after "site" insert "shall pay a license fee for the site"

Page 2, line 6, replace "a" with "that" and remove "A single annual licensing fee"

Page 2, remove line 7

Page 2, line 21, after "fund" insert "- Continuing appropriation"

Page 2, line 24, after "allocated" insert "by the state treasurer and are provided as a standing and continuing appropriation"

Page 2, line 25, after the second period insert "The percentage of each allocation under this subsection to each county must be equal to the percentage that property taxes levied by that county is of all county property taxes levied in the state."

Page 3, line 1, replace "the common schools trust fund to become a part of the" with "school districts for direct property tax relief. The percentage of each allocation under this subsection to each school district must be equal to the percentage that property taxes levied by that school district is of all school district property taxes levied in this state. The amount allocated to a school district under this subsection must be subtracted from the school district's base year tax levy under section 57-15-01.1 for the purpose of determining the school district's maximum levy under section 57-15-01.1 and subtracted from the maximum levy in dollars that would be produced by the maximum levy in mills under section 57-15-14."

Page 3, line 2, remove "principal of that fund."

Re-number accordingly

*Motion to  
Adopt*

Date: 3/15/05  
 Roll Call Vote #: 1

**2005 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. HB 1509**

Senate Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken .0402 pg 2 line 22 down. (from + after last 5)

Motion Made By Senator Trenbeath Seconded By Senator Nelson

Senators	Yes	No	Senators	Yes	No
Sen. Traynor			Sen. Nelson		
Senator Syverson			Senator Triplett		
Senator Hacker					
Sen. Trenbeath					

Total (Yes) 6 No 0

Absent 0

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

Page 1, line 2, after the first semicolon insert "to amend and reenact section 50-06-22 of the North Dakota Century Code, relating to the compulsive gambling prevention and treatment fund;" and after the second semicolon insert "to provide a continuing appropriation;"

Page 1, after line 4, insert:

**"SECTION 1. AMENDMENT.** Section 50-06-22 of the North Dakota Century Code is amended and reenacted as follows:

**50-06-22. Compulsive gambling prevention and treatment fund - Continuing appropriation.** Funds deposited in the compulsive gambling prevention and treatment fund under section 53-12-21 and section 2 of this Act are appropriated to the department on a continuing basis for the purpose of providing the services under section 50-06-21."

Page 1, underscore line 7

Page 1, line 8, underscore "1. "Adjusted gross proceeds" means any sums wagered", replace "in" with "by", and underscore "an internet live poker" and insert immediately thereafter "player"

Page 1, line 9, remove "hand" and underscore "which may be retained by the licensed internet live poker establishment as"

Page 1, underscore lines 10 through 23

Page 1, line 24, underscore "regulation, and operation of internet live poker in the state." and insert immediately thereafter "The rules must include provisions concerning the financial responsibility of persons licensed under this chapter, the conduct of internet live poker, recordkeeping, the establishment and maintenance of internal controls, security of the internet poker site, and the deposit and payment of moneys received and disbursed by the licensee."

Page 2, line 1, underscore "Internet live poker sites" and insert immediately thereafter " - License - User fee" and underscore "- Tax."

Page 2, underscore lines 2 and 3

Page 2, line 4, underscore "sites in the state. The program must include a" and insert immediately thereafter "nonrefundable license application fee of fifty thousand dollars and, upon meeting the requirements for licensure, an annual", underscore "license fee" and insert immediately thereafter "of twenty-five thousand dollars", and underscore "for each person that"

Page 2, line 5, underscore "operates an internet live poker site", replace "and" with " The license may be renewed annually upon compliance with this chapter and rules adopted by the attorney general and payment of a twenty-five thousand dollar license renewal fee. The licensee shall pay to the attorney general", underscore "an annual", replace "licensing" with "user", and underscore "fee of ten dollars for"

Page 2, line 6, underscore "each player who plays internet live poker at a site. A single annual", replace "licensing" with "user", and underscore "fee"

Page 2, underscore lines 7 through 16

Page 2, line 17, underscore "3. The licensed internet live poker establishment shall remit the tax" and insert immediately thereafter "and player user fees" and underscore "to the attorney"

Page 2, underscore line 18

Page 2, line 19, underscore "fees," and insert immediately thereafter "player user fees," and underscore "and any other moneys collected under this chapter to the state treasurer for"

Page 2, underscore line 20

Page 2, after line 20, insert:

**"Internet live poker surcharge - Attorney general legal defense fund established - Continuing appropriation. A five percent surcharge is imposed on the adjusted gross proceeds of each establishment authorized to conduct internet live poker under this chapter. The licensed internet live poker establishment shall remit the surcharge to the attorney general on a quarterly basis. The attorney general shall remit the surcharge to the state treasurer for deposit in the attorney general legal defense fund. The moneys in the fund are appropriated on a continuing basis to the attorney general for the purpose of funding legal services to defend legal challenges to the internet live poker established under this chapter. The surcharge imposed under this section must be suspended upon notification of the state treasurer to the attorney general that the balance in the attorney general legal defense fund has exceeded two million dollars. The attorney general may reinstate the surcharge if the balance in the fund is less than two million dollars."**

Page 2, underscore lines 21 and 22

Page 2, line 23, underscore "any other moneys collected under this chapter.", replace "Annually, all" with "The attorney general shall transfer twenty-five thousand dollars per quarter from the internet live poker proceeds fund to the state treasurer for deposit in the compulsive gambling prevention and treatment fund under section 50-06-22. The total amount transferred under this section to the compulsive gambling prevention and treatment fund may not exceed two million dollars. All remaining", and underscore "moneys in the fund must be"

Page 2, underscore lines 24 through 31

Page 3, underscore lines 1 through 6

Page 3, after line 6, insert:

**"Authority of attorney general. The attorney general may:**

- 1. Inspect all sites or premises in which internet live poker is conducted.**
- 2. Inspect all internet live poker equipment or other items on a site or premises used to conduct or, to assist in the conducting of, internet live poker.**

3. Seize and remove from a site or premises and impound any equipment, supplies, or books and records for the purpose of examination and inspection.
4. Demand access to and inspect, examine, photocopy, and audit all books and records, stored data, software, and other data compilation in any form of applicants or licensees concerning compliance with this chapter or rules adopted by the attorney general. The attorney general may require a licensee to reimburse the attorney general for the reasonable actual cost of expenses incurred in conducting the inspection or audit.
5. Based on reasonable grounds or written complaint, suspend, deny, or revoke an application or license of the applicant or licensee or any officer, director, agent, member, or employee of the applicant or licensee for a violation of this chapter or rule adopted by the attorney general.
6. Impose a monetary fine on a licensee for failure to comply with this chapter or any rule adopted by the attorney general.
7. At any time within three years after any amount of fees, monetary fines, or tax required to be paid under this chapter becomes due, bring a civil action to collect the amount due. An action may be brought regardless of whether the person owing the fees, fines, or tax presently is licensed.
8. Institute an action in any district court for declaratory or injunctive relief against a person, regardless of whether the person is an internet live poker licensee, as the attorney general considers necessary to prevent noncompliance with this chapter or the rules adopted by the attorney general.
9. Require the applicant or licensee to provide information and records in the form and manner determined by the attorney general to determine qualification for issuance of a license or to determine compliance with this chapter and the rules adopted by the attorney general.

**Location of licensee site, premises, records, and equipment.** The internet live poker licensee shall establish and maintain a physical site premises within the state only and may not conduct internet live poker at sites or premises outside this state. The licensee shall maintain within this state, in accordance with this chapter and rules adopted by the attorney general, all servers, records, books, stored data, software, hardware, compiled data, and any other equipment or items used to conduct internet live poker.

**Qualifications of licensee.** In addition to the qualifications required by this chapter and to any rules adopted by the attorney general, to be licensed under this chapter, a person must:

1. If an individual, be at least eighteen years of age;
2. Be of good character and reputation;
3. Have sufficient financial resources to support the activities required to conduct internet live poker under this chapter;
4. Be current in the payment of all taxes, interest, and penalties owed to the state, excluding items under formal dispute or appeal pursuant to applicable statutes; and
5. If an organization, be authorized to conduct business in this state.

Persons not qualified to be a licensee. A person may not be licensed by the attorney general to conduct internet live poker under this chapter if the person:

1. Is an individual, an organization or any of the organization's officers or directors, or the employees or agents of an individual or an organization involved in the conduct of internet live poker in this state who had pled or been found guilty or pled nolo contendere in this state or any other jurisdiction to a criminal offense classified as a felony or an offense authorizing the imposition of more than one year imprisonment, unless at least ten years have passed since satisfactory completion of the sentence or probation imposed by the court for each offense;
2. Has been found to have violated any provision of this chapter or any rule adopted by the attorney general;
3. Has been found to have a background, including a criminal record, or prior activities that pose a threat to the public interest of the state or to the security and integrity of the conduct of internet live poker; create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of internet live poker; or present questionable business practices and financial arrangements incidental to conduct activities authorized by this chapter; or
4. Has knowingly made a false statement of material fact to the attorney general.

Persons prohibited from playing internet live poker.

1. An individual under the age of eighteen years may not play internet live poker at a site licensed under this chapter. An internet live poker licensee may not permit an individual under the age of eighteen years to play internet live poker and shall adopt internal controls and procedures approved by the attorney general to block access to the site or to prohibit play by those individuals.
2. A licensee or the licensee's officers, directors, partners, employees, or the licensee's authorized agents may not play internet live poker at any site licensed under this chapter."

Page 3, underscore lines 7 through 31

Page 4, underscore lines 1 through 13

Page 4, line 14, underscore "implement this chapter" and remove "or who plays without first obtaining a license from the"

Page 4, line 15, remove "attorney general in that individual's name" and underscore "is guilty of a class B misdemeanor."

Page 4, line 16, underscore "Internet live poker records - Confidential." and replace "All records and information with respect to" with:

"1. The following information and records are confidential:

- a. Sales and income tax information, financial statements, and credit reports of applicants and licensees; criminal and background check information of the applicant, licensee, and other persons obtained by

the attorney general in the application process; and application information other than an applicant's name and address;

- b. Internal control and security procedures and information on bids or contractual data, the disclosure of which is harmful to the efforts of the attorney general to contract for goods and services on favorable terms; and
  - c. Personal information regarding and the identity of an internet live poker player.
2. Information related to a person that owes a debt to the state or that has a debt collected through a state agency which is made confidential by another state law or rule remains confidential under this section.
  3. The information made confidential under this section may be disclosed within the attorney general's office or to authorized persons in the proper administration of this chapter or rules adopted by the attorney general or in accordance with a judicial order.

**SECTION 3. ATTORNEY GENERAL INTERNET LIVE POKER IMPLEMENTATION AND OPERATING FUND - CONTINUING APPROPRIATION.**

There is established an attorney general internet live poker implementation and operating fund of one million dollars which consists of gifts, grants, and other funds obtained from nongovernmental sources. The moneys deposited in the fund are appropriated on a continuing basis to the attorney general for the purpose of paying the costs and expenses associated with the implementation, administration, and enforcement of this chapter incurred until June 30, 2007. Expenditures may not be made from the fund until the effective date of this Act and until the sum of one million dollars has been deposited in the fund."

Page 4, remove lines 17 through 20

Renumber accordingly

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

Page 1, line 2, after "of" insert "internet", after the first semicolon insert "to amend and reenact section 50-06-22 of the North Dakota Century Code, relating to the compulsive gambling prevention and treatment fund;", and after the second semicolon insert "to provide a continuing appropriation;"

Page 1, after line 4, insert:

**"SECTION 1. AMENDMENT.** Section 50-06-22 of the North Dakota Century Code is amended and reenacted as follows:

**50-06-22. Compulsive gambling prevention and treatment fund - Continuing appropriation.** Funds deposited in the compulsive gambling prevention and treatment fund under section 53-12-21 and section 2 of this Act are appropriated to the department on a continuing basis for the purpose of providing the services under section 50-06-21."

Page 1, underscore line 7

Page 1, line 8, underscore "1. "Adjusted gross proceeds" means any sums wagered", replace "in" with "by", and underscore "an internet live poker" and insert immediately thereafter "player"

Page 1, line 9, remove "hand" and underscore "which may be retained by the licensed internet live poker establishment as"

Page 1, underscore lines 10 through 23

Page 1, line 24, underscore "regulation, and operation of internet live poker in the state." and insert immediately thereafter "The rules must include provisions concerning the financial responsibility of persons licensed under this chapter, the conduct of internet live poker, recordkeeping, the establishment and maintenance of internal controls, security of the internet poker site, and the deposit and payment of moneys received and disbursed by the licensee."

Page 2, line 1, underscore "Internet live poker sites" and insert immediately thereafter " : License - User fee" and underscore "- Tax."

Page 2, underscore lines 2 and 3

Page 2, line 4, underscore "sites in the state. The program must include a" and insert immediately thereafter "nonrefundable license application fee of fifty thousand dollars and, upon meeting the requirements for licensure, an annual", underscore "license fee" and insert immediately thereafter "of twenty-five thousand dollars", and underscore "for each person that"

Page 2, line 5, underscore "operates an internet live poker site", replace "and" with " . The license may be renewed annually upon compliance with this chapter and rules adopted by the attorney general and payment of a twenty-five thousand dollar license renewal fee. The licensee shall pay to the attorney general", underscore "an annual", replace "licensing" with "user", and underscore "fee of ten dollars for"

Page 2, line 6, underscore "each player who plays internet live poker at a site. A single annual", replace "licensing" with "user", and underscore "fee"

Page 2, underscore lines 7 through 16

Page 2, line 17, underscore "3. The licensed internet live poker establishment shall remit the tax" and insert immediately thereafter "and player user fees" and underscore "to the attorney"

Page 2, underscore line 18

Page 2, line 19, underscore "fees," and insert immediately thereafter "player user fees." and underscore "and any other moneys collected under this chapter to the state treasurer for"

Page 2, underscore line 20

Page 2, after line 20, insert:

**"Internet live poker surcharge - Attorney general legal defense fund established - Continuing appropriation. A five percent surcharge is imposed on the adjusted gross proceeds of each establishment authorized to conduct internet live poker under this chapter. The licensed internet live poker establishment shall remit the surcharge to the attorney general on a quarterly basis. The attorney general shall remit the surcharge to the state treasurer for deposit in the attorney general legal defense fund. The moneys in the fund are appropriated on a continuing basis to the attorney general for the purpose of funding legal services to defend legal challenges to the internet live poker established under this chapter. The surcharge imposed under this section must be suspended upon notification of the state treasurer to the attorney general that the balance in the attorney general legal defense fund has exceeded two million dollars. The attorney general may reinstate the surcharge if the balance in the fund is less than two million dollars."**

Page 2, line 21, underscore "**Internet live poker proceeds fund**" and insert immediately thereafter "**- Continuing appropriation**" and underscore ". There is created in the state treasury an internet"

Page 2, underscore line 22

Page 2, line 23, underscore "any other moneys collected under this chapter.", replace "Annually, all" with "The attorney general shall transfer twenty-five thousand dollars per quarter from the internet live poker proceeds fund to the state treasurer for deposit in the compulsive gambling prevention and treatment fund under section 50-06-22. The total amount transferred under this section to the compulsive gambling prevention and treatment fund may not exceed two million dollars. All remaining", and underscore "moneys in the fund must be"

Page 2, line 24, underscore "allocated" and insert immediately thereafter "by the state treasurer and are provided as a standing and continuing appropriation" and underscore "for:"

Page 2, line 25, underscore "1. Annual transfer to the counties for direct property tax relief." and insert immediately thereafter "The percentage of each allocation under this subsection to each county must be equal to the percentage that property taxes levied by that county is of all county property taxes levied in the state." and underscore "The amount allocated"

Page 2, underscore lines 26 through 31

Page 3, line 1, underscore "2. Annual transfers to" and replace "the common schools trust fund to become a part of the" with "school districts for direct property tax relief. The percentage of each allocation under this subsection to each school district must be equal to the percentage that property taxes levied by that school district is of all school district property taxes levied in this state. The amount allocated to a school district under this subsection must be subtracted from the school district's base year tax levy under section 57-15-01.1 for the purpose of determining the school district's maximum levy under section 57-15-01.1 and subtracted from the maximum levy in dollars that would be produced by the maximum levy in mills under section 57-15-14."

Page 3, line 2, remove "principal of that fund." and underscore "Transfers under this subsection must equal twenty percent"

Page 3, underscore lines 3 through 6

Page 3, after line 6, insert:

**"Authority of attorney general. The attorney general may:**

1. Inspect all sites or premises in which internet live poker is conducted.
2. Inspect all internet live poker equipment or other items on a site or premises used to conduct or, to assist in the conducting of, internet live poker.
3. Seize and remove from a site or premises and impound any equipment, supplies, or books and records for the purpose of examination and inspection.
4. Demand access to and inspect, examine, photocopy, and audit all books and records, stored data, software, and other data compilation in any form of applicants or licensees concerning compliance with this chapter or rules adopted by the attorney general. The attorney general may require a licensee to reimburse the attorney general for the reasonable actual cost of expenses incurred in conducting the inspection or audit.
5. Based on reasonable grounds or written complaint, suspend, deny, or revoke an application or license of the applicant or licensee or any officer, director, agent, member, or employee of the applicant or licensee for a violation of this chapter or rule adopted by the attorney general.
6. Impose a monetary fine on a licensee for failure to comply with this chapter or any rule adopted by the attorney general.
7. At any time within three years after any amount of fees, monetary fines, or tax required to be paid under this chapter becomes due, bring a civil action to collect the amount due. An action may be brought regardless of whether the person owing the fees, fines, or tax presently is licensed.
8. Institute an action in any district court for declaratory or injunctive relief against a person, regardless of whether the person is an internet live poker licensee, as the attorney general considers necessary to prevent noncompliance with this chapter or the rules adopted by the attorney general.
9. Require the applicant or licensee to provide information and records in the form and manner determined by the attorney general to determine qualification for issuance of a license or to determine compliance with this chapter and the rules adopted by the attorney general.

**Location of licensee site, premises, records, and equipment.** The internet live poker licensee shall establish and maintain a physical site premises within the state only and may not conduct internet live poker at sites or premises outside this state. The licensee shall maintain within this state, in accordance with this chapter and rules adopted by the attorney general, all servers, records, books, stored data, software, hardware, compiled data, and any other equipment or items used to conduct internet live poker.

**Qualifications of licensee.** In addition to the qualifications required by this chapter and to any rules adopted by the attorney general, to be licensed under this chapter, a person must:

1. If an individual, be at least eighteen years of age;
2. Be of good character and reputation;
3. Have sufficient financial resources to support the activities required to conduct internet live poker under this chapter;
4. Be current in the payment of all taxes, interest, and penalties owed to the state, excluding items under formal dispute or appeal pursuant to applicable statutes; and
5. If an organization, be authorized to conduct business in this state.

**Persons not qualified to be a licensee.** A person may not be licensed by the attorney general to conduct internet live poker under this chapter if the person:

1. Is an individual, an organization or any of the organization's officers or directors, or the employees or agents of an individual or an organization involved in the conduct of internet live poker in this state who had pled or been found guilty or pled nolo contendere in this state or any other jurisdiction to a criminal offense classified as a felony or an offense authorizing the imposition of more than one year imprisonment, unless at least ten years have passed since satisfactory completion of the sentence or probation imposed by the court for each offense;
2. Has been found to have violated any provision of this chapter or any rule adopted by the attorney general;
3. Has been found to have a background, including a criminal record, or prior activities that pose a threat to the public interest of the state or to the security and integrity of the conduct of internet live poker; create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of internet live poker; or present questionable business practices and financial arrangements incidental to conduct activities authorized by this chapter; or
4. Has knowingly made a false statement of material fact to the attorney general.

**Persons prohibited from playing internet live poker.**

1. An individual under the age of eighteen years may not play internet live poker at a site licensed under this chapter. An internet live poker licensee may not permit an individual under the age of eighteen years to play internet live poker and shall adopt internal controls and procedures approved by the attorney general to block access to the site or to prohibit play by those individuals.

2. A licensee or the licensee's officers, directors, partners, employees, or the licensee's authorized agents may not play internet live poker at any site licensed under this chapter."

Page 3, underscore lines 7 through 31

Page 4, underscore lines 1 through 13

Page 4, line 14, underscore "implement this chapter" and remove "or who plays without first obtaining a license from the"

Page 4, line 15, remove "attorney general in that individual's name" and underscore "is guilty of a class B misdemeanor."

Page 4, line 16, underscore "**Internet live poker records - Confidential.**" and replace "All records and information with respect to" with:

1. The following information and records are confidential:
  - a. Sales and income tax information, financial statements, and credit reports of applicants and licensees; criminal and background check information of the applicant, licensee, and other persons obtained by the attorney general in the application process; and application information other than an applicant's name and address;
  - b. Internal control and security procedures and information on bids or contractual data, the disclosure of which is harmful to the efforts of the attorney general to contract for goods and services on favorable terms; and
  - c. Personal information regarding and the identity of an internet live poker player.
2. Information related to a person that owes a debt to the state or that has a debt collected through a state agency which is made confidential by another state law or rule remains confidential under this section.
3. The information made confidential under this section may be disclosed within the attorney general's office or to authorized persons in the proper administration of this chapter or rules adopted by the attorney general or in accordance with a judicial order.

**SECTION 3. ATTORNEY GENERAL INTERNET LIVE POKER IMPLEMENTATION AND OPERATING FUND - CONTINUING APPROPRIATION.**

There is established an attorney general internet live poker implementation and operating fund of one million dollars which consists of gifts, grants, and other funds obtained from nongovernmental sources. The moneys deposited in the fund are appropriated on a continuing basis to the attorney general for the purpose of paying the costs and expenses associated with the implementation, administration, and enforcement of this chapter incurred until June 30, 2007. Expenditures may not be made from the fund until the effective date of this Act and until the sum of one million dollars has been deposited in the fund."

Page 4, remove lines 17 through 20

Renumber accordingly

Date: 3/16/05  
 Roll Call Vote #: 1

**2005 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. HB 1509**

Senate Judiciary Committee

Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Added Amend .0405 3/17/05

Motion Made By Senator Trenbeath Seconded By Senator Hacker

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	✓		Sen. Nelson	✓	
Senator Syverson	✓		Senator Triplett	✓	
Senator Hacker	✓				
Sen. Trenbeath	✓				

Total (Yes) 6 No 0

Absent 0

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:







REPORT OF STANDING COMMITTEE

HB 1509, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends BE PLACED ON THE CALENDAR WITHOUT RECOMMENDATION and BE REREFERRED to the Appropriations Committee (3 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1509 was placed on the Sixth order on the calendar.

Page 1, line 2, after "of" insert "internet", after the first semicolon insert "to amend and reenact section 50-06-22 of the North Dakota Century Code, relating to the compulsive gambling prevention and treatment fund;", and after the second semicolon insert "to provide a continuing appropriation;"

Page 1, after line 4, insert:

**"SECTION 1. AMENDMENT.** Section 50-06-22 of the North Dakota Century Code is amended and reenacted as follows:

**50-06-22. Compulsive gambling prevention and treatment fund - Continuing appropriation.** Funds deposited in the compulsive gambling prevention and treatment fund under section 53-12-21 and section 2 of this Act are appropriated to the department on a continuing basis for the purpose of providing the services under section 50-06-21."

Page 1, underscore line 7

Page 1, line 8, underscore "1. "Adjusted gross proceeds" means any sums wagered", replace "in" with "by", and underscore "an internet live poker" and insert immediately thereafter "player"

Page 1, line 9, remove "hand" and underscore "which may be retained by the licensed internet live poker establishment as"

Page 1, underscore lines 10 through 23

Page 1, line 24, underscore "regulation, and operation of internet live poker in the state." and insert immediately thereafter "The rules must include provisions concerning the financial responsibility of persons licensed under this chapter, the conduct of internet live poker, recordkeeping, the establishment and maintenance of internal controls, security of the internet poker site, and the deposit and payment of moneys received and disbursed by the licensee."

Page 2, line 1, underscore "**Internet live poker sites**" and insert immediately thereafter "**- License - User fee**" and underscore "**- Tax.**"

Page 2, underscore lines 2 and 3

Page 2, line 4, underscore "sites in the state. The program must include a" and insert immediately thereafter "nonrefundable license application fee of fifty thousand dollars and, upon meeting the requirements for licensure, an annual", underscore "license fee" and insert immediately thereafter "of twenty-five thousand dollars", and underscore "for each person that"

Page 2, line 5, underscore "operates an internet live poker site", replace "and" with ". The license may be renewed annually upon compliance with this chapter and rules adopted by the attorney general and payment of a twenty-five thousand dollar license renewal fee. The licensee shall pay to the attorney general", underscore "an annual", replace "licensing" with "user", and underscore "fee of ten dollars for"

Page 2, line 6, underscore "each player who plays internet live poker at a site. A single annual", replace "licensing" with "user", and underscore "fee"

Page 2, underscore lines 7 through 16

Page 2, line 17, underscore "3. The licensed internet live poker establishment shall remit the tax" and insert immediately thereafter "and player user fees" and underscore "to the attorney"

Page 2, underscore line 18

Page 2, line 19, underscore "fees," and insert immediately thereafter "player user fees," and underscore "and any other moneys collected under this chapter to the state treasurer for"

Page 2, underscore line 20

Page 2, after line 20, insert:

**"Internet live poker surcharge - Attorney general legal defense fund established - Continuing appropriation.** A five percent surcharge is imposed on the adjusted gross proceeds of each establishment authorized to conduct internet live poker under this chapter. The licensed internet live poker establishment shall remit the surcharge to the attorney general on a quarterly basis. The attorney general shall remit the surcharge to the state treasurer for deposit in the attorney general legal defense fund. The moneys in the fund are appropriated on a continuing basis to the attorney general for the purpose of funding legal services to defend legal challenges to the internet live poker established under this chapter. The surcharge imposed under this section must be suspended upon notification of the state treasurer to the attorney general that the balance in the attorney general legal defense fund has exceeded two million dollars. The attorney general may reinstate the surcharge if the balance in the fund is less than two million dollars."

Page 2, line 21, underscore "**Internet live poker proceeds fund**" and insert immediately thereafter "**- Continuing appropriation**" and underscore ". There is created in the state treasury an internet"

Page 2, underscore line 22

Page 2, line 23, underscore "any other moneys collected under this chapter.", replace "Annually, all" with "The attorney general shall transfer twenty-five thousand dollars per quarter from the internet live poker proceeds fund to the state treasurer for deposit in the compulsive gambling prevention and treatment fund under section 50-06-22. The total amount transferred under this section to the compulsive gambling prevention and treatment fund may not exceed two million dollars. All remaining", and underscore "moneys in the fund must be"

Page 2, line 24, underscore "allocated" and insert immediately thereafter "by the state treasurer and are provided as a standing and continuing appropriation" and underscore "for:"

Page 2, line 25, underscore "1. Annual transfer to the counties for direct property tax relief." and insert immediately thereafter "The percentage of each allocation under this subsection to each county must be equal to the percentage that property taxes levied by that county is of all county property taxes levied in the state." and underscore "The amount allocated"

Page 2, underscore lines 26 through 31

Page 3, line 1, underscore "2. Annual transfers to" and replace "the common schools trust fund to become a part of the" with "school districts for direct property tax relief. The percentage of each allocation under this subsection to each school district must be equal to the percentage that property taxes levied by that school district is of all school district property taxes levied in this state. The amount allocated to a school district under this subsection must be subtracted from the school district's base year tax levy under section 57-15-01.1 for the purpose of determining the school district's maximum levy under section 57-15-01.1 and subtracted from the maximum levy in dollars that would be produced by the maximum levy in mills under section 57-15-14."

Page 3, line 2, remove "principal of that fund." and underscore "Transfers under this subsection must equal twenty percent"

Page 3, underscore lines 3 through 6

Page 3, after line 6, insert:

**"Authority of attorney general. The attorney general may:**

1. Inspect all sites or premises in which internet live poker is conducted.
2. Inspect all internet live poker equipment or other items on a site or premises used to conduct or, to assist in the conducting of, internet live poker.
3. Seize and remove from a site or premises and impound any equipment, supplies, or books and records for the purpose of examination and inspection.
4. Demand access to and inspect, examine, photocopy, and audit all books and records, stored data, software, and other data compilation in any form of applicants or licensees concerning compliance with this chapter or rules adopted by the attorney general. The attorney general may require a licensee to reimburse the attorney general for the reasonable actual cost of expenses incurred in conducting the inspection or audit.
5. Based on reasonable grounds or written complaint, suspend, deny, or revoke an application or license of the applicant or licensee or any officer, director, agent, member, or employee of the applicant or licensee for a violation of this chapter or rule adopted by the attorney general.
6. Impose a monetary fine on a licensee for failure to comply with this chapter or any rule adopted by the attorney general.
7. At any time within three years after any amount of fees, monetary fines, or tax required to be paid under this chapter becomes due, bring a civil action to collect the amount due. An action may be brought regardless of whether the person owing the fees, fines, or tax presently is licensed.
8. Institute an action in any district court for declaratory or injunctive relief against a person, regardless of whether the person is an internet live poker licensee, as the attorney general considers necessary to prevent noncompliance with this chapter or the rules adopted by the attorney general.

9. Require the applicant or licensee to provide information and records in the form and manner determined by the attorney general to determine qualification for issuance of a license or to determine compliance with this chapter and the rules adopted by the attorney general.

**Location of licensee site, premises, records, and equipment.** The internet live poker licensee shall establish and maintain a physical site premises within the state only and may not conduct internet live poker at sites or premises outside this state. The licensee shall maintain within this state, in accordance with this chapter and rules adopted by the attorney general, all servers, records, books, stored data, software, hardware, compiled data, and any other equipment or items used to conduct internet live poker.

**Qualifications of licensee.** In addition to the qualifications required by this chapter and to any rules adopted by the attorney general, to be licensed under this chapter, a person must:

1. If an individual, be at least eighteen years of age;
2. Be of good character and reputation;
3. Have sufficient financial resources to support the activities required to conduct internet live poker under this chapter;
4. Be current in the payment of all taxes, interest, and penalties owed to the state, excluding items under formal dispute or appeal pursuant to applicable statutes; and
5. If an organization, be authorized to conduct business in this state.

**Persons not qualified to be a licensee.** A person may not be licensed by the attorney general to conduct internet live poker under this chapter if the person:

1. Is an individual, an organization or any of the organization's officers or directors, or the employees or agents of an individual or an organization involved in the conduct of internet live poker in this state who had pled or been found guilty or pled nolo contendere in this state or any other jurisdiction to a criminal offense classified as a felony or an offense authorizing the imposition of more than one year imprisonment, unless at least ten years have passed since satisfactory completion of the sentence or probation imposed by the court for each offense;
2. Has been found to have violated any provision of this chapter or any rule adopted by the attorney general;
3. Has been found to have a background, including a criminal record, or prior activities that pose a threat to the public interest of the state or to the security and integrity of the conduct of internet live poker; create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of internet live poker; or present questionable business practices and financial arrangements incidental to conduct activities authorized by this chapter; or
4. Has knowingly made a false statement of material fact to the attorney general.

**Persons prohibited from playing internet live poker.**

1. An individual under the age of eighteen years may not play internet live poker at a site licensed under this chapter. An internet live poker licensee may not permit an individual under the age of eighteen years to play internet live poker and shall adopt internal controls and procedures approved by the attorney general to block access to the site or to prohibit play by those individuals.
2. A licensee or the licensee's officers, directors, partners, employees, or the licensee's authorized agents may not play internet live poker at any site licensed under this chapter."

Page 3, underscore lines 7 through 31

Page 4, underscore lines 1 through 13

Page 4, line 14, underscore "implement this chapter" and remove "or who plays without first obtaining a license from the"

Page 4, line 15, remove "attorney general in that individual's name" and underscore "is guilty of a class B misdemeanor."

Page 4, line 16, underscore "**Internet live poker records - Confidential.**" and replace "All records and information with respect to" with:

1. The following information and records are confidential:
  - a. Sales and income tax information, financial statements, and credit reports of applicants and licensees; criminal and background check information of the applicant, licensee, and other persons obtained by the attorney general in the application process; and application information other than an applicant's name and address;
  - b. Internal control and security procedures and information on bids or contractual data, the disclosure of which is harmful to the efforts of the attorney general to contract for goods and services on favorable terms; and
  - c. Personal information regarding and the identity of an internet live poker player.
2. Information related to a person that owes a debt to the state or that has a debt collected through a state agency which is made confidential by another state law or rule remains confidential under this section.
3. The information made confidential under this section may be disclosed within the attorney general's office or to authorized persons in the proper administration of this chapter or rules adopted by the attorney general or in accordance with a judicial order.

**SECTION 3. ATTORNEY GENERAL INTERNET LIVE POKER IMPLEMENTATION AND OPERATING FUND - CONTINUING APPROPRIATION.**

There is established an attorney general internet live poker implementation and operating fund of one million dollars which consists of gifts, grants, and other funds obtained from nongovernmental sources. The moneys deposited in the fund are appropriated on a continuing basis to the attorney general for the purpose of paying the

costs and expenses associated with the implementation, administration, and enforcement of this chapter incurred until June 30, 2007. Expenditures may not be made from the fund until the effective date of this Act and until the sum of one million dollars has been deposited in the fund."

Page 4, remove lines 17 through 20

Renumber accordingly

**2005 TESTIMONY**

HB 1509

# ND Constitution

## Sec. 25. [Games of chance].

The legislative assembly shall not authorize any game of chance, lottery, or gift enterprises, under any pretense, or for any purpose whatever. However, the legislative assembly shall authorize the State of North Dakota to join a multi-state lottery for the benefit of the State of North Dakota, and, the legislative assembly may authorize by law bona fide nonprofit veterans', charitable, educational, religious, or fraternal organizations, civic and service clubs, or such other public-spirited organizations as it may recognize, to conduct games of chance when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, fraternal, religious, or other public-spirited uses.

\* Exceptions: ① charitable gaming  
② state lottery

# Black's Law Dictionary definition of gambling & gaming

GANGIATORI

**Galee**, institutes of /instatyúwts av géyas/. See Institutes.

**Galee**. In English law, the payment of rent, tax, duty, or annuity. The right is a license or interest in the nature of real estate, conditional on the due payment of rent and observance of the obligations imposed on the galee. It follows the ordinary rules as to the devolution and conveyance of real estate. The galee pays the crown a rent known as a "galeage rent," "royalty," or some similar name, proportionate to the quantity of minerals taken from the mine or quarry.

**Galea** /gáliya/. In old records, a piratical vessel; a galley.

**Gallagher agreements**. See Mary Carter agreement.

**Gallon**. A liquid measure containing 231 cubic inches, or four quarts; the standard gallon of the United States. The imperial gallon contains about 277, and the ale gallon 282, cubic inches. The metric equivalent is 3.785 liters.

**Gallows**. A scaffold; a beam laid over either one or two posts, from which persons sentenced to capital punishment are hanged.

**Gamalis** /gaméylas/. A child born in lawful wedlock; also one born to betrothed but unmarried parents.

**Gambler**. One who follows or practices games of chance or skill, with the expectation and purpose of thereby winning money or other property. See Gambling.

**Gambling**. Making a bet. Such occurs when there is a chance for profit if a player is skillful and lucky. State, ex rel. Com'r of State Police v. One Helix Game, 122 Mich.App. 148, 333 N.W.2d 24, 28. A play for value against an uncertain event in hope of gaining something of value. Beamel Amusement Corp. v. Police Dept. of Suffolk County, 54 Misc.2d 946, 283 N.Y.S.2d 760, 761. It involves, not only chance, but a hope of gaining something beyond the amount played. Gambling consists of a consideration, an element of chance, and a reward. In re Gaming Devices Seized at American Legion Post No. 109, 197 Pa.Super. 10, 176 A.2d 115, 122. The elements of gambling are payment of a price for a chance to win a prize. Boies v. Bartell, 82 Ariz. 217, 310 P.2d 834, 837. Gambling is regulated by state and federal statutes. See e.g. 18 U.S.C.A. §§ 1081 et seq. See also Bet; Bookmaking; Game of chance; Gaming; Lottery; Wager.

**Gambling device**. Tangible means, instrument, contrivance, or thing with or by which money may be lost or won, as distinguished from the game itself. Harris v. State, 207 Tenn. 538, 341 S.W.2d 576, 578. A machine, implement, or contrivance of any kind for the playing of an unlawful game of chance or hazard. See Slot machine.

**Gambling place**. Any place, room, building, vehicle, vessel, tent or location which is used for any of the following: Making and settling bets; receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries or policy games; playing games of chance for

money or other property; or playing gambling devices. See 18 U.S.C.A. § 1081.

**Gambling policy**. In life insurance, one issued to a person, as beneficiary, who has no pecuniary interest in the life insured. Otherwise called a "wager policy." Such policies are generally illegal or not otherwise written by insurance companies because of the absence of an insurable interest.

**Game**. Wild birds and beasts. The word includes all game birds, game fowl, and game animals. State ex rel. Sofeico v. Hefferman, 41 N.M. 219, 67 P.2d 240, 246. A sport, pastime or contest. A contrivance which has for its object to furnish sport, recreation, or amusement. Ex parte Williams, 127 Cal.App. 424, 16 P.2d 172, 173. See Gaming.

**Game-keeper**. One who has the care of keeping and preserving the game in a reserve, forest, or the like.

**Game laws**. Federal and state laws passed for the preservation of wildlife, usually forbidding the killing or capturing of specified game either entirely or during certain seasons, or by certain described means, or by restricting the number and type of game that may be killed or trapped in season. See 16 U.S.C.A. § 661 et seq., 18 U.S.C.A. § 41 et seq. See also Lacey Act; Open season.

**Game of chance**. A game in which chance rather than skill determines the outcome. Kansas City v. Caresio, Mo., 447 S.W.2d 535, 537. See also Lottery.

**Gaming**. The practice or act of gambling. An agreement between two or more persons to play together at a game of chance for a stake or wager which is to become the property of the winner, and to which all contribute. The elements of gaming are the presence of price or consideration, chance, and prize or reward. Automatic Music & Vending Corp. v. Liquor Control Com'n, 426 Mich. 452, 396 N.W.2d 204, 206. See Gambling.

**Gaming contracts**. See Wager.

**Gaming device**. See Gambling device.

**Gaming house**. See Gambling place.

**Gananciales** /ganánsiyáleys/. A Spanish term, used as either a noun or adjective, and applied to property acquired during marriage. Discussed in Sanchez v. Bowers, C.C.A.N.Y., 70 F.2d 715, 716. See Ganancial property.

**Ganancial property** /gənánshəl própərdiy/. In Spanish law, a species of community in property enjoyed by husband and wife, the property being divisible between them equally on a dissolution of the marriage. See Community property.

**Ganancias** /ganansiyás/. In Spanish law, gains or profits.

**Gang**. Any company of persons who go about together or act in concert; in modern use, mainly for criminal purposes.

**Gangiatori** /gənj(i)ətóray/. Officers in ancient times whose business it was to examine weights and measures.

ND Constitution Article XI

Re: HB 1509

Sec. 25.

The legislative assembly shall not authorize any game of chance, lottery, or gift enterprises, under any pretense, or for any purpose whatever. However, the legislative assembly shall authorize the State of North Dakota to join a multi-state lottery for the benefit of the State of North Dakota, and, the legislative assembly may authorize by law bona fide nonprofit veterans', charitable, educational, religious, or fraternal organizations, civic and service clubs, or such other public-spirited organizations as it may recognize, to conduct games of chance when the entire net proceeds of such games of chance are to be devoted to educational, charitable, patriotic, fraternal, religious, or other public-spirited uses.

**12.1-28-01. Gambling - Definitions.**

As used in this chapter:

1. "Gambling" means risking any money, credit, deposit, or other thing of value for gain, contingent, wholly or partially, upon lot, chance, the operation of gambling apparatus, or the happening or outcome of an event, including an election or sporting event, over which the person taking the risk has no control. Gambling does not include:

a. Lawful contests of skill, speed, strength, or endurance in which awards are made only to entrants or to the owners of entries; or

b. Lawful business transactions, or other acts or transactions now or hereafter expressly authorized by law.

2. "Lottery" means any plan for the distribution of a thing of value, whether tangible or intangible, to a person or persons selected by chance from among participants, some or all of whom have given a consideration for the chance of being selected.

3. "Gambling apparatus" means any device, machine, paraphernalia, or equipment that is used or usable in the playing phases of any gambling activity, whether that activity consists of gambling between persons, or gambling by a person involving the playing of a machine. Gambling apparatus does not include an amusement game or device as defined in section 53-04-01.

4. "Gambling house" means any location or structure, stationary or movable, wherein gambling is permitted or promoted, or where a lottery is conducted or managed. In the application of this definition, any place where gambling apparatus is found is presumed to be a gambling house, provided that this presumption shall not apply where cards, dice, or other games are found in a private residence.

# N.D. Century Code

## 12.1-28-02. Gambling - Related offenses - Classification of offenses.

Except as permitted by law:

1. It is an infraction to engage in gambling on private premises where the total amount wagered by an individual player exceeds twenty-five dollars per individual hand, game, or event.

2. It is a class A misdemeanor to:

a. Sell, purchase, receive, or transfer a chance to participate in a lottery, whether the lottery is drawn in state or out of state, and whether the lottery is lawful in the other state or country;

b. Disseminate information about a lottery with intent to encourage participation in it, except that a legal lottery may be advertised in North Dakota; or

c. Engage in gambling on private premises where the total amount wagered by an individual player exceeds five hundred dollars per individual hand, game, or event.

3. A person is guilty of a class C felony if that person engages or participates in the business of gambling. Without limitation, a person is deemed to be engaged in the business of gambling if that person:

a. Conducts a wagering pool or lottery;

b. Receives wagers for or on behalf of another person;

c. Alone or with others, owns, controls, manages, or finances a gambling business;

d. Knowingly leases or otherwise permits a place to be regularly used to carry on a gambling business or maintain a gambling house;

e. Maintains for use on any place or premises occupied by that person a coin-operated gaming device; or

f. Is a public servant who shares in the proceeds of a gambling business whether by way of a bribe or otherwise.

4. a. As used in subsection 3 but with the exceptions provided by subdivision b of this subsection, the term "coin-operated gaming device" means any machine that is:

(1) A so-called "slot" machine that operates by means of the insertion of a coin, token, or similar object and which, by application of the element of chance, may deliver, or entitle the person playing or operating the machine to receive cash, premiums, merchandise, or tokens; or

(2) A machine that is similar to machines described in paragraph 1 and is operated without the insertion of a coin, token, or similar object.

b. The term "coin-operated gaming device" does not include a bona fide vending or amusement machine in which gambling features are not incorporated as defined in section 53-04-01, or an antique "slot" machine twenty-five years old or older that is collected and possessed by a person as a hobby and is not maintained for the business of gambling.

c. A law enforcement officer may seize any device described in subdivision a upon probable cause to believe that the device was used or is intended to be used in violation of this chapter or chapter 53-06.1. The court shall order the device forfeited in the same manner and according to the same procedure as provided under chapter 29-31.1.

**Source:** S.L. 1973, ch. 116, § 27; 1977, ch. 473, § 17; 1981, ch. 159, § 1; 1989, ch. 170, § 1; 1991, ch. 129, § 1; 1991, ch. 346, § 1; 1993, ch. 124, § 1.

## N.D. Century Code

- only poker permitted is by charitable organizations
- based on N.D. Const. Art. XI Sect. 25

### 53-06.1-07.2. Poker.

Poker may be conducted on not more than two occasions per year. An organization may supply the dealer. The maximum single bet is one dollar. Not more than three raises, of not more than one dollar each, may be made among all the players in each round of bets. For nontournament activity, an organization shall charge each player a fee not to exceed two dollars per one-half hour of playing time, collected in advance. For a tournament, an organization shall charge each player an entry fee and the amount of prizes may not exceed ninety percent of the gross proceeds.

**Source:** S.L. 1987, ch. 608, § 3; 1989, ch. 615, § 5; 1991, ch. 545, § 4; 1993, ch. 499, § 13; 1995, ch. 484, § 13; 1997, ch. 428, § 7; 1999, ch. 441, § 5; 2001, ch. 460, § 7; 2003, ch. 449, § 5.

Roy Cooke, Senior Columnist

## It's Poker, Not Gambling!

By Roy Cooke With John Bond



An awful lot of what goes on in the world is about image. The casino industry has over the past decade engaged in a pretty successful image campaign, encouraging the use of the word gaming as opposed to gambling in order to make the business seem more acceptable. Wall Street and the media have pretty much bought into this semantic manipulation, and tend to describe the industry accordingly.

I have often referred to our poker world as being part of the gambling community, in part because poker rooms tend to be located in gambling establishments. In addition, many gamblers also play poker. Furthermore, many poker players treat the game as a gambling experience and approach it from a perspective not significantly different from the way they approach gambling games. The fundamental unit of both poker and gambling is the wager, a sum of money risked with the outcome determined by an event or series of events in which chance is one of the variables. (In most gambling, chance is the *only* variable.) These are all things poker has in common with gambling.

Regardless of these commonalities, poker is far more different from gambling than it is similar. They are mathematically, pragmatically, historically, culturally, socially, legally, and, in my opinion, morally differentiated. In the past, this has been for the most part a matter of small consequence, a subject for discussion and debate around the bar, perhaps, but not really important. Poker players explained to their wives and mothers that what they did wasn't really gambling, but a game of skill. Times have changed, however, and the distinction between poker and gambling has become very important to the current and future health of the game.

Internet poker grew by more than 600 percent, both in number of players and volume of money bet, between the end of 2002 and the end of 2003. If poker is lumped with Internet gambling, it now constitutes 10 percent of the online gaming market. After years of sluggish performance and a static supply of players and money, poker is presently enjoying incredible popularity, fueled by the Internet, including Chris MoneyMaker's incredible parlay of \$40 on an Internet cardroom site into the *World Series of Poker* title and its \$2.5 million first-place prize. The popularity of TV poker, resulting from producer Steve Lipscomb's introduction of

the lipstick camera to show players' holecards, has also been a major factor in the current healthy state of poker. The poker world has never seen anything like this, far surpassing the growth in the game when California opened up poker in the early '90s. But this growth is gravely threatened.

There are bills pending in the U.S. House and Senate designed to disembowel Internet gambling. One in particular, introduced by Sen. Jon Kyl, R-Ariz., is very close to coming to the floor and enjoys bipartisan support. The U.S. Justice Department, having plenty of excess resources not allocated to the war on terrorism, is using a 1960s-era law that was designed to inhibit illegal bookies to pressure financial institutions and media who do business with Internet gambling sites, and is promising prosecutions. Fearing competition, many stalwarts of the brick-and-mortar "gaming" industry have, in a strange bedfellows kind of partnership, joined with religious and "family values" groups to lobby for restrictions or prohibition of all forms of Internet wagering, including poker.

If poker is defined as substantially different from gambling (as contemplated by existing and proposed laws), the Internet version of the game that has been the engine driving growth can perhaps be insulated from the barrage of present and pending attacks. This approach is somewhat complicated by the reality that some online poker sites and some Internet gambling sites have related ownerships. For them, any regulation of either Internet gambling or poker is a loss, and they may not be happy about the idea of treating the two industries separately. But the best interest of poker is clearly served by legally bifurcating the two, and poker is what matters to me.

Personally, I think that while government regulation of both poker and gambling on the Internet may perhaps be appropriate to protect players from the unscrupulous, prohibition of either is wrong. There is much sentiment in America that government needs to tend to its own business, stick to the big issues like war and health care, and stay the hell out of people's lives. Both the libertarians of the right and the civil libertarians of the left tend to support that philosophy. But as a member of the poker community, and one associated with an Internet poker site, I believe that if the government elects to choose regulation of wagering activity on the

Internet, poker's best defense is to make the case that it is not the same as gambling and should not be treated by the law in the same way. The most significant consideration is that poker and gambling are indeed different animals.

The biggest distinction between poker and gambling is that in much all gambling, you are playing against the house. This can be particularly problematic when you are playing a computerized game against the people who control the program. If you win, the house loses. If the house wins, you lose. The games favor the house. In poker, the house has no interest in the outcome, and is an impartial provider of services-for-a-fee, a forum for the players to compete equally against each other.

Another major difference between poker and gambling is that the rules of poker accord every player a statistically equal chance to win, but the rules of gambling games all give the house a definite advantage against the player, which over time is inexorable and inevitable. In essence, poker is fair, gambling is not.

The mechanics of poker and gambling are different in a fundamental way. In gambling, you post a wager, after which an event occurs over which you have little or no control, and which determines whether you win or lose. At the point where you risk your money, you are always an underdog. In poker, you receive your cards with an equal chance against your opponents, and then make decisions of whether or not to wager or match wagers made by other players as the hand progresses.

Poker is a game of skill. It is a contest of abilities, more akin to bridge or chess than it is to gambling, in that more-talented players will prevail against less-talented players. Chance can and will

affect short-term results, but skill separates winners from losers over time. The claims of a few purported card counters and system players notwithstanding, skill can only mitigate your losses when you gamble, and chance rather than skill is the principal determining factor in your results. A California court said in 1938: "A game is not to be regarded as one of skill merely because that element enters into the result in some degree, or as one of chance solely because chance is a factor in producing the result. The test of the character of a game or scheme as one of chance or skill is, which of these factors is dominant in determining the result." *People v. Settles*, 29 Ca App Supp 2d 781, 78 P 2d 274 (Appellate Department, Superior Court, County of Los Angeles, 1938)

There are other arguments that favor poker over gambling that are perhaps intangible but no less real than the ones mentioned above. Poker is a part of the fabric of America, woven into our history from Ulysses S. Grant playing with his fellow junior officers in the Mexican-American War through Harry Truman being interrupted at his poker game to learn that FDR had died and Harry had become president. From Mississippi riverboats to the California Gold Rush to the foxholes of Ardennes, the Chosin Reservoir, and Khe Sang, poker is part of our cultural makeup, our frontier heritage, our individualistic mentality. Presidents Harding, Coolidge, Roosevelt, Eisenhower, Nixon, and Johnson all frequently played poker. In some state capitols, more business of governing has been done at poker tables than in committee.

Beyond being historic, poker much more than gambling is ubiquitous. Kitchen-table poker and weekly poker night are sta-

*Continued on Page 114*

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# Real Poker

Continued from Page 16

plus of our society. In 1968, a report estimated that 50 million Americans had played some poker. That number has surely grown in the caddy shack, the bowling alley, or after Supreme Court hearings — and of course on the Internet and in hundreds of public cardrooms around the country that didn't exist back in those days. You find poker in hundreds of movies, in the officers lounge of the Starship Enterprise, in the Travis Magee detective novels. And, of course, it's all over cable TV.

Poker is democratic. It matters whether you have the money to play, but the game doesn't care if you're black, white, Asian, Hispanic, male, female, gay, in a wheelchair, or even an obnoxious jerk. You sit down with your buy-in at the green felt and you have all the rights, privileges, and the same chance to win as everybody else at the table. You'll never get to play a pickup game against Michael Jordan or a round of golf against Tiger, or tear up the track against Matt Kenseth, but you can plop your buy-in down and take on Doyle Brunson or Howard Lederer. Where else in America can you parlay a \$40 buy-in into a shot at \$2.5 million with grit, skill, and a little luck? (And it's not the kind of luck where the odds are rigged against you, I might add.)

Fair. Historic. Ubiquitous. Democratic. It's mighty hard for gambling to make such a case for itself. But, then again, there's no reason it should. Poker is, after all, a different thing.

Perhaps the weightiest relevant distinction between poker and gambling is the legal recognition by many jurisdictions that

they are in fact different. A large majority of states prohibit gambling, but at least 37 states have some form of legal poker. California, for example, prohibits games played against the house, but permits poker. Florida has a provision against gambling in its state constitution, but has by affirmative act of its legislature distinguished and permitted poker on a regulated basis. Other examples abound.

I fervently hope the Feds will not further pursue restriction of either gambling or poker on the Internet. I hope the lobbyists who are making the case on behalf of the online casinos prevail and manage to shoot the whole thing down. But you can't take hopes to the bank. To wait for the shoe to drop would be foolhardy and naive. To preserve the flow of new players and new money into poker rooms around the country, the industry must band together and properly define itself as something different and apart from the gambling business.

And aside from the legal issues, it wouldn't hurt our image a bit.♦

*Roy Cooke played winning professional poker for more than 16 years. He is a successful real estate broker/salesperson in Las Vegas — please see his ad below. If you would like to ask Roy poker-related questions, you may do so online at [www.UnitedPokerForum.com](http://www.UnitedPokerForum.com). John Bond is an attorney and free-lance writer in South Florida.*

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## I. Nelson Rose

# States Win Again

In the 1950s and '60s, the term "states' rights" became a code phrase for segregation. While the federal government was attempting to integrate schools, some state governors were blocking the doorways.

Television also gave state governments a bad name, or at least made them seem insignificant. A half-hour news program has time to cover only what the president did that day. Governors, let alone state legislatures, get attention only when they do something unusual; and state regulators are almost always ignored, unless they do something stupid.

But state and local governments, which have the primary responsibility for everything from transportation and education to health and crime control, probably have the most impact on the average person's daily life. For some industries, and legal gambling is the prime example, the major impact of federal laws and regulations is merely to create more paperwork.

In most parts of the world, legal gambling is uniquely a creature of state laws. Federal governments, like the European Union and the governments of Canada and Australia, usually leave it up to the individual member states to decide what forms of gambling should be made legal and how the games should be controlled.

Nowhere is this more true than in the United States, where Utah, a state with a complete prohibition on gambling, can share a common border with Nevada and still be part of the same country.

Legal gambling has played a surprisingly important role in the historical shifting of power between the states and the federal government.

At first, the states were all-important. The United States was created by 13 separate, independent colonies, having much of the power of nations, deciding to create a federation of governments. The principal goals were practical: banding together for a common defense, and establishing a single currency.

We can get a good idea of what this was like by

looking at Europe, where the euro has replaced the lire and franc, but not the independence of Italy and France.

The new American federal government was seen as so limited that the drafters of the Constitution could not agree whether there should be any federal trial courts at all.

All of this changed in the 19th century. The Industrial Revolution made it possible for anyone, including gambling operators, to communicate across the country in minutes instead of months.

In 1903, the United States Supreme Court ruled on *The Lottery Case*, issuing one of its most important decisions, not just for legal gambling, but for the country. States were being swamped by Louisiana Lottery tickets, and they asked the federal government for help. Congress responded by passing a statute, still on the books, making it a federal crime to send lottery tickets across state lines. For the first time, the High Court held that the federal government had power over a legal product, simply because it was involved in interstate commerce. This created the modern, massively powerful federal government, since virtually everything involves interstate commerce.

The tide has turned over the last 20 years, led by Chief Justice William H. Rehnquist and a slim majority of the U.S. Supreme Court.

Legal gambling is once again playing a leading role.

In 1996, in one of the most important rulings of the last few decades, the Court knocked out part of the Indian Gaming Regulatory Act, and with it much of the power of the federal government over states. This case, *Seminole Tribe v. Florida*, led to other cases, so that today, state governments, including state regulators, can often do what they want without having to worry about acts of Congress or lawsuits from angry individuals.

This is obviously good news for state lotteries and gaming regulators, since these are parts of governments. But anyone who wants, or has, a license — such as racetracks and casinos, and

their patrons — has lost a way to fight back.

In its most recent gambling case, the Supreme Court has given states even more protection. The dispute involved cruise ships and docking rights. But the result is that individuals may not now even be able to take their complaints about state regulators to other regulators.

The case began when South Carolina Maritime Services Inc. asked for permission to berth its casino cruise ship, the M/V Tropic Sea, at the South Carolina State Port Authority's facilities in Charleston. The Tropic Sea was going to sometimes cruise down to the Bahamas and sometimes take day trips to nowhere. The Port Authority, part of the state government of South Carolina, refused, contending that it had an established policy of denying berths in Charleston to vessels whose primary purpose was gambling. Maritime Services filed a complaint with the Federal Maritime Commission, noting that the Port Authority allowed Carnival

Cruise Lines' ships with casinos to dock.

The Port Authority, naturally, said it did nothing wrong. But it also asked the federal regulator to dismiss the complaint, based on its sovereign immunity.

Every government has the right to refuse to be sued without its consent. The 11th Amendment to the U.S. Constitution explicitly says that a state that does not agree cannot be sued in federal court.

The Port Authority wanted to take that immunity one step further. It asserted it could not be forced to defend itself not in a federal court, but in a hearing before a federal agency.

The U.S. Supreme Court, by a 5-4 majority, agreed. The Court said that the administrative "proceeding walks, talks, and squawks like a lawsuit." The Supreme Court did not want to use the phrase, but we all know this as "the duck test."

So, the law now is that if an administrative hearing would look like a trial, it will be treated as if it were a lawsuit

filed in a court. The Court made it clear that this means a state and all of its agencies, which would include state lotteries and regulators, cannot be forced to defend claims in federal or state courts, or in federal or state adversarial administrative hearings. This applies to all individuals, companies, and even tribes who might feel they have been wronged.

States can still consent to adversary hearings. State agencies often hire people to conduct hearings, called administrative law judges. Regulators have no trouble arguing their cases in front of their own employees.

But I expect that we will see more state agencies passing regulations and asking their legislatures for statutes protecting them from having to defend their actions before outside trial court and administrative law judges. ♦

*Professor I. Nelson Rose is recognized as one of the world's leading authorities on gambling law. His web-site is [www.GamblingAndTheLaw.com](http://www.GamblingAndTheLaw.com).*

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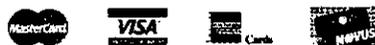
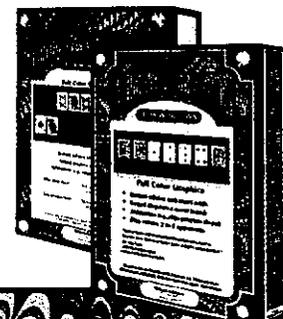
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## It's the Future

I know a thing or two about Internet poker.

Five years ago, I was called by the founder of PlanetPoker.com, the first Internet poker room, and was asked to be a consultant. Originally, my duties were to coordinate anti-collusion efforts, which is very important in the Internet poker industry. For people to be comfortable playing on the Internet, they must believe that real and genuine efforts have been made to keep the games honest.

Eventually, my role with Planet grew. I became a part of the site's marketing efforts, and became the site's public face as its cardroom manager. I helped implement the Internet poker bulletin board Unitedpokerforum.com, enlisted top-quality pros to answer poker questions there, and formulated standards for moderation. I also post there myself and host the site. I met with software engineers who were designing new and more advanced Internet poker interfaces. I have lectured on Internet poker, and have met with Internet poker players visiting Las Vegas. I've also consulted with others in the industry regarding our responses to government regulation.

It has been an interesting ride. At the onset, many experienced poker executives thought the cyberspace version of our game would never catch on. How wrong they were, in what may well have been wishful thinking! At peak times, more than 100,000 players are playing poker from the convenience of their homes — betting, bluffing, check-raising, and cussing out their opponents. It's poker, as it will predominantly exist in the future. Just as the period from the 1970s to the 1990s marked the evolution of poker from private games to public cardrooms, the present era marks a new evolutionary step. However, just as public cardrooms did not lead to the end of private poker, neither will Internet poker lead to the end of public cardroom poker. The game is not diminished by this evolution, but enhanced. The new world of poker includes private games, public games, and Internet games. That reality is here to stay.

Internet poker is not the same as the real thing, and has its own unique features. It's faster moving, offers more action and more selection, and provides players the ability to play multiple games at once. Nobody can smoke around you if you don't want them to, you choose your own distractions, you can turn off the chat feature, and

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When E-mailing authors at cardplayer@cardplayer.com, please put the writer's name you would like to reach on the subject line of the E-mail.

you don't even need to get dressed and leave the house. While governmental regulation and its effect on transferring funds into and out of games may cloud the horizon, the Internet game is here to stay, and will be the foundation of poker's future.

Internet poker has introduced our game to millions of players who did not have daily poker games available to them. Now, across America and around the world, players can find games and tournaments at a variety of stakes around-the-clock. The number of people who play poker every day is growing at an increasing rate. While this phenomenal rate of growth cannot continue and there are many challenges to the Internet poker industry, it is here to stay. I plan in my next several columns to give you something of an insider's look into how Internet poker has evolved, the parameters of what can and can't be done, the issues confronting the industry, and what the future may hold.

As the Internet poker industry has developed, I have developed a perspective that's available to few others. I have spent the past five years in the place where poker knowledge, business issues, matters of integrity, government regulation, marketing, and software development intersect. As is the case with all new industries and ventures, in which many things are being defined for the first time, the learning curve has been steep. Like the intrepid explorers of *Star Trek*, Internet poker pioneers have boldly gone where no one has gone before, and I have immensely enjoyed my role as a partner in that journey.

Once upon a time not too long ago and not too far away, there was one Internet poker program offered by a company

named ASF, which was licensed to or leased by anyone wanting to offer real-money poker over the net. The software company took a percentage of the gross drop. There was limited interaction between the software developers and the businessmen who took the risks to build the industry. What distinguished one site from another were such matters as policy, marketing, how collusion and other integrity issues were handled, and the ease of moving funds in and out of the site. Sites have come and gone. Recent industry data indicates that there are now approximately 120 poker sites.

New software developers have come along. People who owned poker sites have poured their profits into building a better Internet game, creating new interfaces, backends, and different system operations. Today, we are into the second generation of Internet poker software, and the third generation is not far off. As many choices as there are available to players today, the future will offer even more.

Writing an Internet poker program is not easy. One Internet programming project manager once told me, "It was over 10 times harder than I initially thought it would be to launch a poker program." Then, he added, "At launch, the nightmare of my life started." The combination of possible events in a poker game is almost infinite, and when writing an Internet poker program, you need to have all of them logically defined and a program routine to account for all of them; otherwise, the program will freeze up. Also, when you realize that in order to have an Internet poker game, you need to be able to send signals to

*Continued on Page 112*

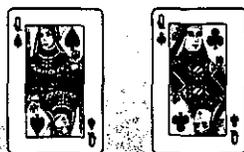
## Tournament Hand Matchup: A Hand From the 2004 American Poker Championship

This hand took place at Turning Stone Casino during the *American Poker Championship*. Randy Jensen, who was short-stacked with about \$30,000, raised it to \$8,000 when the blinds were \$2,000-\$4,000. John D'Agostino re-raised from the small blind, putting Randy all in. Randy called with the  $Q\heartsuit Q\clubsuit$  and John had the  $K\heartsuit J\spadesuit$ .

### Randy Jensen's Hand

#### Winning Percentage

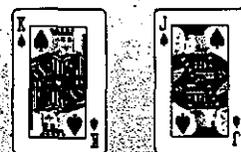
Before Flop: 68%



### John D'Agostino's Hand

#### Winning Percentage

Before Flop: 32%



### The Flop



### The Turn



### The River



**Note:** Randy's small raise was successful because John moved in on him. John had plenty of chips, so he could afford to be aggressive. However, John should have thought that something smelled funny with Randy's double-the-big-blind raise. Even if John had just called, he flopped top pair and would have put Randy all in on the flop. Either way, Randy got in with the best hand and ended up losing to the flush on the river.

# Real Poker

Continued from Page 12

10 players who are all over the planet, receive a signal back from them, keep everyone connected (even those in third-world countries with poor communication systems), decipher the information, and display it on a screen, it is a wonder that the games function at all.

Internet poker is developing technologically. From the foundations of the ASF software developed more than six years ago, advances have taken place. I have spent hundreds, perhaps thousands, of hours teaching poker concepts to programmers and staff members who are trying to learn programming concepts and how they affect poker.

Protecting against collusion was just one of the many areas I discussed with programmers. We had to define parameters that would flag potential collusion. Writing a program to identify anomalous poker plays was much harder. Delineating certain raising and folding patterns that indicated a possibility of collusion was harder yet.

One of the hardest things to implement has been determining when the program should bring the combination of variables that might indicate collusion to the attention of a human. At PlanetPoker, every single allegation of potential collusion made by a player finds its way to my desk, as does every potential collusion program flagged by the software. I know that many other sites have a person in a similar role. I investigate every

allegation, reviewing hundreds and sometimes thousands of hands that relate to every single potential collusion situation. And then to top it off, there is a system of random review. These anti-collusion efforts are but a single example of where the poker player and the programmer must work together.

As I'll discuss at greater length in a later column, an important concept in the Internet poker business is keeping games "live" and encouraging future action by having rules and policies that are designed to some extent to assist weaker players, such as offering a note-taking feature. Keeping "live" players in the game longer serves the interest of the game on many levels.

Not long ago, an Internet poker site introduced a feature that allowed players to take notes on their opponents and have those notes stored. Being able to write notes about your opponents on your client base (the software has two bases, one downloaded on your computer and one on a server in another location) changed the nature of the game as played on the Internet, and differentiated it significantly from live poker in brick-and-mortar establishments.

The note-taking feature made player recall strengths much less important and replaced them with good organizational and note-taking skills. It also made playing multiple games less mentally taxing, allowing players to play longer hours more effectively. Additionally, it strengthened the position of the serious player who was willing to make the effort to take notes, and weakened the position of the recreational player who found that making that level of effort took much of the fun out of the game.

Because the note-taking feature significantly increased the edge of serious players at the expense of recreational players, I encouraged my company's management to resist the trend to add the feature. As time went on, more and more sites added the feature, until it became clear that we would eventually have to add it for competitive reasons. Although it might hurt the game in the long run, by shifting money from softer players to tougher players faster, the competitive marketplace dictated the adoption of the feature.

These are just a few examples of what is going on in Internet poker today, how business decisions affect variables in ways that most people don't consider, and the absolute certainty that whatever direction Internet poker takes, it will have twists and turns that will surprise each and every one of us.

In my next couple of columns, I'll provide more examples of how Internet poker differs from public cardroom poker, how the industry addresses different issues, and what is going on in this fast-changing business today. ♦

*Roy Cooke played winning professional poker for more than 16 years. He is a successful real estate broker/salesperson in Las Vegas. If you would like to ask Roy poker-related questions, you may do so online at [www.UnitedPokerForum.com](http://www.UnitedPokerForum.com). His longtime collaborator John Bond is a free-lance writer in South Florida.*

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7:00pm Second Chance Tournament

Limit Omaha/8 - \$125 Buy-in (no re-buys)

Sept 6 No-Limit Hold'em - \$60 Buy-in (\$25 re-buys)

7:00pm Second Chance Tournament - Tag Team,

Hold'em/Omaha/8 - \$125 Buy-in (one re-buy \$100)

Sept 7 No-Limit Hold'em - \$60 Buy-in (\$25 re-buys)

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Mike Sexton

# Poker On an Amazing Run

Television and online poker fuel poker's growth

**P**oker has grown tremendously over the past two years. It has become a phenomenon throughout the country. The big reasons for that growth are television and online poker. And two of the most influential forces in these categories are the *World Poker Tour* and PartyPoker.com (the world's largest online poker site).

I feel fortunate to have what I consider to be the two best jobs in the poker world — commentator on the *World Poker Tour* and host for PartyPoker.com. I consider both of these entities to be beneficial to everyone in the poker industry. As they grow and prosper, so does the poker world, because they are leaders in bringing new players into poker.

It's hard to believe that the *World Poker Tour* has been on the air for only slightly more than 18 months. And look what's happened since: Poker has become accepted as a legitimate competition. Wednesday night, with the *WPT* on the *Travel Channel*, is considered "Poker Night" across America. The *World Poker Tour* has gone public (NASDAQ — WPT Ent), giving it legitimacy in the business world. The *WPT* will soon be seen in several countries around the world. The *WPT* has tremendous brand recognition and will be retailing many poker-related items. Poker rooms everywhere are expanding in size. No-limit hold'em is the most popular tournament event everywhere you go. And because of the success of the *WPT*, numerous spinoff poker shows are in the making.

In addition to the above, other positive things are coming in the near future that will continue to bolster the popularity of poker and the *World Poker Tour*. They include things such as the development of the Professional Players Tour (PPT) and charity events at *WPT* venues. The PPT will be a series of tournaments for qualified players that will be sponsored by the *WPT*, with substantial money (\$500,000) being added to each of the prize pools. And because of the ever-increasing popularity of the game, the poker world contributing to charities, and positive TV ratings, you can look for the corporate world to be venturing into poker on a much larger scale.

The growth of online poker also continues to amaze many. I'm often asked, "Do you think online poker will continue to grow?" My answer is this: "I don't think online poker has scratched the surface of its potential."

PartyPoker.com is the industry leader and is very special to me. I was with the site nine months before it launched. It's like a baby you watch being born and grow, and you nurture it to adulthood. I helped with the development of the site, training customer support and creating the initial marketing idea to bring players to the site, a unique event called the *PartyPoker.com Million*. This tournament (a *WPT* event), held annually on a luxurious cruise ship, has become legendary in the poker world.

The growth of PartyPoker.com has truly been incredible since its launch slightly more than three years ago. What vaulted the site to the top of the industry was a number of things, including being in the right place at the right time and strong marketing.

Here's an example of their marketing prowess. PartyPoker.com was the first online poker site to advertise on TV, and they did it in a big way. They contacted the *Travel Channel* to advertise on the *World Poker Tour* (before anyone knew the show would be a hit). They said they would buy two ads per show (the maximum allowed) for not only every episode of Season 1, but for all of the reruns of Season 1, as well — and would pay cash in advance for them. (And it didn't hurt that I was a commentator on the *WPT* and was also seen in the PartyPoker.com commercials.) Once the TV ads started, PartyPoker.com quadrupled its business in 30 days, and it hasn't looked back.

Special thanks to the *World Poker Tour* and PartyPoker.com for all that they do in bringing new players to poker. It's a great time for everyone in the poker industry.

Take care. ♠

*Mike Sexton is the host of PartyPoker.com and a commentator on the World Poker Tour, which can be seen every Wednesday on the Travel Channel.*

**HOUSE CONCURRENT RESOLUTION NO. 3035**

Introduced by

Representatives Kasper, Dosch, Iverson, Thoreson, Weiler

1 A concurrent resolution for the amendment of section 25 of article XI of the Constitution of  
2 North Dakota, relating to internet live poker.

**STATEMENT OF INTENT**

4 This measure requires the legislative assembly to authorize the establishment of internet live  
5 poker establishments.

6 **BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF NORTH DAKOTA, THE**  
7 **SENATE CONCURRING THEREIN:**

8 That the following proposed amendment to section 25 of article XI of the Constitution of  
9 North Dakota is agreed to and must be submitted to the qualified electors of North Dakota at  
10 the general election to be held in 2006, in accordance with section 16 of article IV of the  
11 Constitution of North Dakota.

12 **SECTION 1. AMENDMENT.** Section 25 of article XI of the Constitution of North  
13 Dakota is amended and reenacted as follows:

14 **Section 25.** The legislative assembly ~~shall~~ may not authorize any game of chance,  
15 lottery, or gift enterprises, under any pretense, or for any purpose whatever. However, the  
16 legislative assembly shall authorize the state of North Dakota to join a multi-state lottery for the  
17 benefit of the state of North Dakota, and, the legislative assembly may authorize by law bona  
18 fide nonprofit veterans', charitable, educational, religious, or fraternal organizations, civic and  
19 service clubs, or such other public-spirited organizations as it may recognize, to conduct games  
20 of chance when the entire net proceeds of such games of chance are to be devoted to  
21 educational, charitable, patriotic, fraternal, religious, or other public-spirited uses. The  
22 legislative assembly shall authorize the establishment of internet live poker establishments.  
23 The internet live poker establishments must be located in the state and licensed and regulated  
24 by the state.

**Testimony in Support of  
House Bill No. 1509  
House Judiciary Committee  
February 1, 2005**

Chairman DeKrey, House Judiciary Committee members, my name is Todd D. Kranda. I am an attorney with the Kelsch Law Firm in Mandan and I appear before you today as a lobbyist on behalf of the Charitable Gaming Association of North Dakota (CGAND) to express support for HB 1509.

As explained, it would appear that HB 1509 is an attempt to license internet poker activity that is already occurring nationwide. In doing so, HB 1509 proposes to obtain a license fee for the operator and the players. HB 1509 also includes a provision for a tax on the adjusted gross proceeds with internet poker activity. While no Fiscal Note was available, the amount that could be generated from these fees and tax are substantial for the state.

CGAND does not believe that HB 1509 will have any negative impact upon the charitable gaming activity that already occurs within the state. Accordingly, CGAND supports this legislation. Also, if there was a need to include charitable organizations to make this proposal feasible CGAND would be interested in looking at that opportunity.

Accordingly, CGAND supports HB 1509 and urges a favorable Do Pass recommendation.

**I. Nelson Rose**

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## **Gambling and the Law7:**

### **The Future Legal Landscape for Internet Gambling**

**Prepared for The Fourth Annual International Symposium on Internet  
Gambling Law and Management**

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#### **Introduction**

**More and more clients are asking their lawyers whether Internet gambling is legal. To adequately represent clients interested in becoming involved in any way with Internet gambling requires lawyers to not only determine whether current laws, primarily criminal statutes, apply, but also to predict what the law will look like in the near future. The nature of the Internet requires that any legal analysis, including predictions of future developments, include multiple levels of government, ranging from tribes and states to countries, multi-national federations and international law. Most important are the laws that might impact the owners and operators of**

a website, which include not only where these individuals reside, but also where their computers are located and even the site of their server. As a practical matter, whether a local law makes it illegal for a player to make a bet is of less concern to operators; although large gaming corporations have to be careful to avoid illegal activities abroad to protect their home licenses and all operators are concerned with the collectability of wagers placed by credit cards.

A prediction of the content of future statutes is at best an educated case, since legislation is shaped much more often by politics than by logic. Still, patterns are developing in the way governments are responding to the proliferation of online betting.

1. Most governments have not passed, or even seriously considered, any special legislation. Many of these say that they are studying the issue.

The most interesting potential development here is the United Kingdom. There are so many opportunities to gamble, including the world's largest lottery and well-established sports books, that regulating the Internet did not appear to be a high-priority. In fact, there still is little movement toward placing any restrictions on a British citizens right to place a bet online. However, Great Britain taxes legal betting operations very heavily. Some of the best known operators are moving to other parts of the British Commonwealth. Ladbrokes, for example, calls itself the world's biggest bookmaker. Its website is licensed by the government of Gibraltar. Ladbrokes.com, launched in February 2000, highlights repeatedly that bettors pay no tax. The loss of not just future tax revenue from online wagers but existing tax revenue from wagers placed by telephone and in person is forcing the government to reexamine its present position of simply ignoring Internet gambling.

2. Governments, principally through their State Lotteries, are beginning to operate online gambling games themselves, but restricting play to local patrons. A very small number of governments are operating the games themselves and accepting bets from anywhere in the world.

The best example of the latter is the principality of Liechtenstein, although when it started its InterLotto in 1995, it had significant restrictions on patrons located in the two relatively powerful countries that completely surround it: Austria and Switzerland. The current game site, PLUS Lotto, does not mention any restrictions and is available in many languages, including English.

The preferred position of almost all other State Lotteries is to restrict sales to residents of that particular state. One of the first to go online was Finland. Its Lottery, Oy Veikkaus, has restrictions (instructions in Finnish, local bank account required) which effectively limit play to citizens within that country.

International organizations of State Lotteries are putting tremendous political pressure on government-run games to restrict their marketing to patrons within their own borders. Unwritten agreements have existed since the 1980s among

State Lottery directors, preventing cross-border marketing; that is why there are no billboards for the Washington State Lottery in Oregon. But in the late 1990s international organizations, such as AELLE, the European Association of State Lotteries and Lottos, began holding conferences in which the issue of State Lotteries marketing internationally on the Internet was of primary concern. The World Lottery Association, comprised of more than 140 lotteries, was created in 1999 by the merger of Intertoto and AILE (the International Association of State Lotteries) to Atry and get some control on the Internet,@ among other goals.

Few governments will therefore follow the example of Liechtenstein, although we have not yet heard from most Third World countries. National governments in much of Africa and part of South America and Asia could decide to ignore the political pressure put on them by the rest of the world and reap the economic benefits of being able to sell tickets to their relatively small State Lotteries to a much wider market.

3. Government licensing schemes range from merely selling licenses to requiring complete background checks and continuing oversight of operators. There appear to be approximately 54 jurisdictions issuing licenses. These are primarily smaller nations, such as Antigua, and states and territories of larger nations, including those in Australia, although at least one tribe is also issuing licenses.

It appears that many more governments will be getting into the business of regulating and licensing online gaming. With the possible exceptions of the governments of South Africa and the United Kingdom, these licensing bodies will continue to be parts of the governments of states, territories and smaller nations, rather than federal governments or the governments of larger nations. Governments which can issue licenses under existing laws will do so, for example, the Australian Capitol Territory used its Bookmakers Act of 1985. Other states will pass enabling legislation.

The trend is also toward more regulation. Government officials realize that the Internet gambling industry has failed to grow as quickly as predicted, in part due to a lack of confidence on the part of players. A single scandal in any part of the world can put the industry back months.

The United States government has also been putting pressure on foreign governments, such as Antigua, which have a major presence on the Internet. The major concern is money laundering, and individuals involved with the development of Antigua=s laws on Internet gambling have been visited by the Department of the Treasury's Financial Crimes Enforcement Network, commonly known as "FinCEN."

It is unclear whether increased regulation will lead to increased fees or competition among governments will result in lower costs to operators. There is evidence both ways. In October, 2000, the ruling party of Costa Rica announced that it would be introducing legislation to require operators to pass Interpol background checks and Abuy a \$150,000 operating license, as well as pay sales and luxury (consumo) taxes and a yearly fee based on the volume of bets they process.@ On the other hand, one observer Anoted that states [in Australia] are starting to compete by offering lower tax rates, which range from 8% to a

prohibitive 50%. And little territory Norfolk Island offers a 4% tax rate.@

4. Some smaller governmental units, particularly states in the United States, are rushing through acts prohibiting wagering online. State anti-Internet gambling laws take one of two forms: They either prohibit all forms of Internet gambling, or they only appear to prohibit online gaming, while actually authorizing their local legal gambling operations to take bets online.

It is safe to say that all proposed prohibitions start as sweeping bans, broadly written. During the time they are being considered and debated, they either retain essentially the same form as proposed, or are amended by a series of exclusions for existing legal forms of gambling.

The difference in outcome seems to be whether the broad prohibition first proposed is adopted as is, before it can be subjected to amendments creating exceptions for existing forms of legal gambling. Attorney General Opinions, for example, are subjected only to internal review within the A.G.'s office. Their publication often comes as a surprise, because few outsiders even know the question is under consideration. So, state A.G. Opinions in the United States are almost universally condemning of all parts of Internet gambling.

Legislation, on the other hand, usually requires months of hearings and are open to proposed amendments. Many of the prohibitions use language so broad that they would outlaw existing legal gaming, for example, prohibiting every form of betting which uses a computer. State Lotteries and parimutuel wagering on horse races could not exist without computers and have well-established interstate systems. Lobbyists for legal gambling operations have no choice but to ask legislatures to carve out exceptions for their clients. Politicians may talk Prohibition, but the future clearly is prohibition only for those forms of gambling that have little political power. For gambling operations with influence, mostly large established businesses, prohibition actually means clarifying the law to create partial legalization.

Nevada, as usual, led the way in showing how an established industry can turn an attempt at prohibition into legalization of its business and the raising of barriers against potential competition. Nevada was the first state not only to outlaw, but also to legalize, Internet gambling. Making or accepting a wager over the Internet is now, by statute, a crime committed in Nevada, unless the operator is one of the state's licensees.

Even bans that are supposed to be universal will often be so poorly worded that they result in the accidental legalization of Internet gambling by local legal operators. For example, California's A.B. 2179, attempts to outlaw, by name, every form of gambling imaginable. But, the proposed statute defines AA prohibited online gambling game@ as including A Lottery games, other than games lawfully conducted by the California State Lottery.@

Michigan is the prime example. The Michigan Legislature passed a bill, signed into law by the Governor, which was intended to ensure that activities, like bomb threats, that were already illegal if conducted off-line would also be crimes

if conducted on the Internet. On November 3, 1999, the Michigan House of Representatives passed a different bill, HB 4689, with the stated purpose of making it a felony to accept a bet on the Internet. This bill attracted considerable attention and debate, because it contained a clause that would have expressly allowed Michigan licensed gaming operations to take bets on the Internet. A month later SB 562 sailed quickly through both houses with little discussion and was signed into law by Gov. John Engler. SB 562 was broader than HB 4689: it prohibits many crimes from being conducted on the Internet, beyond just gambling. However, the crimes are not given names as in the House bill; rather, the new law prohibits the use of the Internet to commit or attempt a list of specified crimes, defined purely by references to existing statutes. Gambling on the Internet, for example, is not expressly prohibited; SB 562 only makes it a crime to use a computer for communicating with a person with the purpose of committing, attempting to commit, conspiring to commit, or soliciting another person to commit conduct proscribed under section 301, 302, 303, 304, 305, 305a, or 311 of this act [1931 PA 328, which created the Michigan criminal code] or section 18 of the Michigan gaming control and revenue act, the Initiated Law of 1996, MCL 432.218. Those sections listed are the state's anti-gambling statutes. But, those sections expressly define gambling as not including all forms of legalized gambling in the state. This means that the prohibition on using the Internet for gambling is far from universal: Michigan's State Lottery, racetracks, bingo and casinos do not even have to seek a second approval from the Legislature, as they would have had to under HB 4689, to play their games online.

5. Some larger governments, including the federal governments of the United States and Australia, are adopting a go-slow attitude. This has taken the form of proposed federal laws which would prevent states, territories and tribes within these federations from issuing Internet gambling licenses or operating the games themselves.

While states are rushing to legalize or prohibit, larger federal governments are having trouble forming coherent policies. Even the reactions of the governments of Great Britain and South Africa fit this model, where the former has studiously avoided taking a position while the latter is moving, slowly, toward a federal form of licensing. States and small nations are typically not only smaller in population than federations but are often more homogeneous. The smaller the political unit the more likely it is to be dominated by a single religious group, or at least for the majority of the population to hold the same view of the morality of gambling.

Smaller political bodies are also more often swayed by the lure of easy money. At least one city considered trying to grab a piece of the virtual pie: The Las Vegas City Council debated licensing the city's name for use on an Australian-based Internet casino, VegasOne.com. The City Council was told this online casino might have an annual net win of \$360 million by the year 2003, giving the city about \$90 million a year. Las Vegas has an annual budget of only \$320 million. Of course, to win \$360 million would require wagers of about \$3 billion, meaning this single site would have to have as much action as the rest of the world combined.

Some state attorneys general have also been aggressive, at least against Internet operators over whom they can clearly exercise personal jurisdiction. Even local law

enforcement has gotten involved, when the operator is physically within its jurisdiction. The District Attorney of Los Angeles County seized computer files and records of YouBet!, forcing the large horse-betting website to move out of the state and pay a \$500,000 Acontribution@ to problem gambling programs.

Prohibitory state and local laws have a real-world impact. OTB operations in the United States, which are ignoring potential federal laws, publicly declare that they will not accept wagers from states where betting on horse races is illegal. Fear of loss of a state license has prevented large, legitimate gaming operators from becoming involved in online wagering through their U.S. based operations. Companies which have or contemplate applying for a license in a U.S. jurisdiction are even reluctant to accept wagers from Americans through their foreign-licensed subsidiaries. Meanwhile, competitive, legitimate operators without U.S. licenses are developing their gambling websites under licenses from foreign countries. This includes individuals and companies like K. Rupert Murdoch, who has a major presence in the United States, through Fox Television and other properties, but who also is heavily invested in Sports Internet Group PLC, an Australian company taking bets from Americans. If legitimate operators can gingerly take chances with possibly violating U.S. state laws, questionable operations, many of whom do not even claim to be licensed, will continue to flourish.

The law-making processes of federal governments are also, of course, subject to politics. In fact, it looks like politics will prevent a bill explicitly prohibiting Internet gambling from passing the United States Congress, at least in the foreseeable future.

Anyone who doubts that politics shapes legislation should examine the history of the Internet Gambling Prohibition Act, commonly called the Kyl Bill, after its author, Jon Kyl (R-Az) and similar proposals introduced into the House of Representatives. The Kyl Bill was first proposed as an amendment to the Crime Prevention Act of 1995. In its early years, the Internet Gambling Prohibition Act proposed placing far more restrictions on gambling than the infamous 18<sup>th</sup> Amendment=s Prohibition on intoxicating liquors. It would have outlawed virtually everything, from actual betting online to merely putting information in online gambling magazines. The proposed restrictions against putting gaming information online were so broad, that it would have been dangerous for a licensed casino to advertise its legal activities on the World Wide Web.

The Kyl Bill=s major weakness, besides violating the First Amendment=s protection of free speech, was that it would also have made it a federal crime to merely place a bet. The U.S. Department of Justice, which does not have fond memories of its role trying to enforce Prohibition, made it clear that it did not support a law that would require knocking on bedroom doors to go after \$5 bettors.

In addition the national horse racing industry, which depends upon off-track betting to survive, found that its computer operations might fall under the prohibitions on computer-assisted gambling. Similarly, State Lotteries would have been prevented from conducting their successful multi-state drawings, like Powerball. So the Kyl Bill had to be amended.

Every form of legal gambling that has a lobbying presence in Washington, D.C., was

able to get an exception written into the bill. As passed by the Senate, the Kyl Bill would outlaw all Internet gambling. But bettors have been dropped, so only businesses would be committing crimes by conducting gambling online. Also excluded:

1. Securities and commodities, as if day-trading was not gambling;
2. Closed-loop systems for placing bets on horse and dog races, including from a home PC in one state to an OTB operator in another.
3. Parimutuel pooling of bets between tracks.
4. State Lotteries, including multi-State Lotteries, so long as the betting PC is in a facility open to the general public.
5. Bets made for a fantasy sports league game or contest.
6. Closed loop intra-state systems, so bettors in Nevada can make wagers on sports events with licensed sports books in the state.

The federal Department of Justice made it clear that it was uneasy with so many explicit exemptions. Its position was founded in law: The D.O.J. has consistently stated that acts should be treated the same whether they are committed online, in person or on the telephone. If it is not a federal crime to make a bet by voice on the phone, it should not be a crime to make the identical bet by computer modem. The D.O.J. has also taken the position that present laws cover most Internet gambling. It has stated that expressly exempting certain forms of legal gaming from a prohibition on Internet gambling has the legal effect of authorizing those specified forms. Although the D.O.J.'s legal reasoning is correct, it is interesting to note that it has never gone after state-authorized off-track betting operations that accept wagers from across state lines by phone, as in New York, or by both phone and the Internet, as in Pennsylvania.

A similar proposed federal ban on Internet gambling by Rep. Bob Goodlatte (R-Va.), failed to pass the U.S. House of Representatives in 2000, although it did receive a majority vote. This bill was put before the House under a procedure that barred amendments, but required a two-thirds vote to pass. Opposition to the bill arose from groups with radically divergent agendas: Indian tribes felt they would be denied forms of gambling they now had, the D.O.J. and anti-gambling activists thought the bill would actually expand forms of betting which are now forbidden on the Internet, and the Clinton administration feared this initial interference with the development of commerce on the Internet.

#### VI. The First Emerging Major Fight: States v. Federal Governments.

The major conflict in the coming years will be the fight between federal governments and smaller governmental bodies. At the moment, the major contenders are the national legislatures of the United States and Australia against their member states and territories, and, in the case of the U.S., tribes. The other major federations do not appear to be in conflict: Canada has not acted, the European Union has stepped aside and South Africa has preempted the field.

The federal government of Canada is in the awkward position of having sold the control of gambling to its provinces, when it needed money for the Calgary Olympics. At the time it looked like the federal government was

giving up relatively little: the only major forms of gambling were parimutuel wagering on horse races and State Lotteries, and the federal government did not see much financial loss in voluntarily excluding itself from the lottery market. The development of tribal gaming cemented the federal government's position: Whether First Nations could operate casinos was an issue left to the provinces to negotiate. Although it is not impossible, the Canadian Parliament would be slow in becoming actively involved in any issue involving gambling, even gaming on the Internet.

The European Union is such a young federation that it is still in the process of developing basic power positions among its players. Nations (called Member States) which joined the European Union agreed that they would not keep out the goods and services of other Member States. But, the European Court of Justice has consistently ruled that Member States of the EU do not have to allow in legal gambling from other members. Gambling is one of the unique areas where local customs and morals trumps the law of this new federation. The first major opinion came in the Schindler case. The Court of Justice had to decide whether the United Kingdom could keep out advertisements and tickets of legal German lotteries. The ruling is a remarkable declaration of a state's power to control all forms of gambling within its borders. The Court held that lotteries are A services@ within the meaning of article 60 of the EEC Treaty. Article 59 prohibits a Member State from putting obstacles on cross-border services. But the Court declared that A given the peculiar nature of lotteries,@ the U.K. could restrict or even prohibit lotteries from other EEC Member States, provided those restrictions were not discriminatory.

More recent cases have reaffirmed the right of Member States to decide for themselves how they will handle legal gambling. The Laara case extended Schindler. Finland had a law allowing only state-licensed games of chance for charities; criminal proceedings were brought against Mr. Laara for operating slot machines without a license. Because the case involved gaming devices, the Court had to decide whether Member States could exclude goods as well as services. More importantly for purposes of analyzing the holding as a precedent for Internet gambling, at the time Schindler was decided, the U.K. had forbidden all lotteries. Finland allowed slot machines, but allowed them only for a A public body@ holding a license. Still, the Court focused on holdings from Schindler, drawing attention A to the moral, religious and cultural considerations which attach to lotteries, like other forms of gambling, in all Member States.@ The Court held that Finland was not discriminating against non-Finnish citizens. It ended its Judgment with a ruling that the EC Treaty did A permit restrictions which are justified by virtue of a connection, even on an occasional basis, with the exercise of official authority or on grounds of public policy, public security or public health.@ As for gambling:

the legislation at issue in the main proceedings responds to the concern to limit exploitation of the human passion for gambling, to avoid the risk of crime and fraud to which the activities concerned give rise and to authorise those activities only with a view to the collection of funds for charity or for other benevolent purposes.

The most recent gambling case before the Court of Justice, Zenatti, actually involved, in tiny part, Internet gambling. The question for the Court was whether the police prosecuting authority of Verona could prohibit Mr. Zenatti from acting as an intermediary in Italy for a U.K. company which accepted bets on sporting events. Zenatti sent the forms to the U.K. by fax and Internet. In Italy, licenses are issued only for accepting bets on races, regattas, ball games and similar contests and only for limited purposes. The Court held the Italian legislation, like the U.K. laws in Schindler, was designed to prevent gambling from being a source of private profit, as well as to avoid risks of crime and fraud and the damaging individual and social consequences of the incitement to spend money gambling. The Court, however, remanded the case back to the national court of Italy to verify whether, in fact, the limited issuing of gambling licenses was really to achieve those desirable social objectives, or whether gambling had been legalized merely to raise money for government. A Member State has the right to protect its citizens from the perceived evils of widespread gambling; it does not have the right to give itself a monopoly on legal gambling principally to make money.

The European Court of Justice understands the limited power of a federation, a lesson that has not sunk into the federal legislatures of the United States and Australia. These two federations, which are basically governments of governments, are trying to stop the entire political process while they consider what to do about Internet gambling. But, while federal governments have great power, states have almost always been the chief guardians of morality, including the control of gambling.

The law of nations holds that every state has an inherent Apolice power@: the right, perhaps even the obligation, to protect the health, safety and welfare of its citizens. The police power is most commonly connected with governmental action taken in emergency situations, especially where public health is endangered, as in an epidemic. But gambling, licensed or illegal, even legal lotteries, has always been held to fall within a state=s police power.

Federal governments, on the other hand, sometimes forget that they only have the power given them by the states that created them. The result is constant tension and endless disputes over who has the final say. The conflict

is actually easily resolved, if the federal government remembers that the reason for it becoming involved in areas, like gambling, that are state issues is only to help enforce public policy decisions made by the states themselves.

This would not be a problem if everyone agreed on the solution for any particular political problem. But, as the fight over Internet gambling shows, a state may want to do something that is completely opposite the wishes of its federal government.

In Australia, a moratorium on state Internet gambling licenses failed by a tie vote in the Commonwealth Senate. It was never clearly explained exactly how the federal government could stretch its power over communications to overrule the states when it comes to the control of gambling.

The United States, the oldest constitutional federation in the world, may be the ultimate test. If states decide to allow limited gambling on the Internet, especially if the wagers do not cross state lines, what right does the federal government have to tell them ANo@?

As an extreme example: In the movie ACasino,@ one of the main characters is based on the real-life Frank ALefty@ Rosenthal. The movie is a fictionalized account of events that actually happened, as told in the nonfiction book Casino: Love and Honor in Las Vegas. Rosenthal ran the Stardust and three other casinos for the Chicago mob. When the Nevada Gaming Commission found that AFrank Rosenthal is a person whose licensing would reflect or tend to reflect discredit upon the State of Nevada,@ Rosenthal appealed.

In ruling against Rosenthal, the Nevada Supreme Court declared that when it comes to legal gambling, there are no federal civil rights!

We view gaming as a matter reserved to the states within the meaning of the Tenth Amendment to the United States Constitution. Within this context we find no room for federally protected constitutional rights. This distinctively state problem is to be governed, controlled and regulated by the state legislature and, to the extent the legislature decrees, by the Nevada Constitution. It is apparent that if we were to recognize federal protections of this wholly privileged state enterprise, necessary state control would be substantially diminished and federal intrusion invited.

There are few, if any, other areas of human affairs where a state=s highest appellate court would make such a statement. As a declaration of state=s rights it matches, or surpasses, any statement coming out of the era of the

**conflict over racial desegregation. Taking the Nevada Supreme Court at its word: To control gaming a state may discriminate on the basis of race. Federal constitutional prohibitions on discrimination would not apply. Even state constitutional rights do not apply, unless the State Legislature gives its blessing.**

**Other courts have said the Rosenthal opinion goes too far. But, the Nevada Supreme Court=s basic approach still holds true. Take this statement by the United States Supreme Court: "While lotteries have existed in this country since its founding, States have long viewed them as a hazard to their citizens and to the public interest ... Gambling implicates no constitutionally protected right; rather, it falls into a category of 'vice' activity that could be, and frequently has been, banned altogether."**

**State police power has three interesting, and unusual, attributes:**

**1) A state=s police power is virtually unlimited. It is the nature of government for the state to exercise power for the good of society as a whole, at the expense of individual rights. This is obvious in totalitarian and authoritarian regimes. But the same is true of democracies. Ever since Jean-Jacques Rousseau published his Social Contract in 1762, it has been generally accepted that a democratic state derives its sovereign power from the surrender by individuals of their natural liberties.**

**Constitutional and other legal safeguards protect citizens from improper use of the state=s power. But, when a state is faced with a threat to the health, safety and welfare of its citizens, particularly in an emergency, the police power prevails. The police power trumps constitutional and other legal rights; government has the legal right and power to do literally almost anything to anyone. For example: During an epidemic, government health officials will not wait for a jury trial before quarantining a house. At its most extreme, government can even take life without due process safeguards – the police do not conduct evidentiary hearings before shooting a madman firing a rifle.**

**Because gambling is treated as a police power issue, governments can act in ways that would be unthinkable in other commercial and social settings. AThe police power of the State to suppress gambling is practically unrestrained.@ ABecause we are dealing with authorized gambling, the State may exercise greater control and use the police power in a more arbitrary manner.@**

**2) A state=s police power is often tied to morality. It used to be a given that government played an important role in upholding the moral standards of a community. The 1980s led to a pervasive belief in situational ethics, the**

notion that there are no absolute standards of right and wrong. By the 1990s, even anti-gambling crusaders rarely argue that gambling should be outlawed because it is immoral; they fear being viewed as right-wing religious fanatics. However, government=s police power is still aimed at morally suspect behavior, even if the justification given is more pragmatic than religious.

For example, the Florida Supreme Court upheld and rationalized that State Legislature=s ban on Sunday racing and betting as follows:

[T]he legislature could reasonably find that the Sunday racing and betting restrictions serve several legitimate state purposes which promote the public health, safety, morals, and general welfare of the citizens of the state of Florida. The restrictions serve these legitimate purposes: 1) they encourage people to spend their weekend leisure time at non-gambling, presumably more healthy recreational pursuits and other activities; 2) closing such facilities on what might otherwise be the busiest day of the week could help curb the compulsive gambler syndrome; and 3) racing on less busy days means there is less opportunity for mischief that sometimes attends these events, and therefore a lighter burden on law enforcement authorities is created... The mere fact that the state of Florida has no uniform day of rest for other businesses does not preclude the legislature from having a day of rest and surcease from racing and pari-mutuel wagering.

Gambling has always been inextricably linked with the morality of a society, supporting the use of the police power. There may be few published appellate decisions on the legality of Internet gambling. But, the question of a state government=s ability, under its police power, to control the transmission of gambling information and wagers was resolved years ago.

The explosion of legal gambling in recent years has not weakened state government=s police power over gambling.

[Plaintiffs] further urge that because of greater acceptance of gambling, the prohibition on the forwarding of money to be wagered on horse racing is an archaic and unreasonable exercise of the police power... It has long been settled that the police power extends to objectives in furtherance of the public peace, safety, morals, health and welfare, and the prohibition or regulation of betting on horse races falls within the power. Not only does the Legislature have the power to completely prohibit wagering on horse races, but it may also limit such wagering to persons physically present within the enclosure.

3) A state's police power is a local issue. We are, after all, dealing with State police power. Larger government organizations like federations almost never become involved, unless the threat to society is beyond the control of local government.

During the formative stages of modern governments the protection of citizens' health and safety was best left to authorities on the scene. Given the technology existing then, and perhaps even today, the major threats of fire and disease were not controllable from distant national capitols.

Morality also was and still is decided primarily at the local level. In the American system states are encouraged to experiment. New Jersey's experiment with using large land-based casinos as a tool of urban redevelopment failed, but Iowa's refinement of the idea – putting the casinos on river boats – has been copied by half-a-dozen other states.

Gambling, both legal and illegal, has always been a state police power issue; it is the duty of local and state governments to act to protect their citizens' health, safety and welfare. The federal government only becomes involved when it is required, as with Indian gaming. Under the Commerce Clause and the doctrine known as our Federalism, it is difficult to understand how the federal government could justify intervening if states choose to allow their citizens to make or accept Internet wagers from other states with identical policies. If no interstate commerce is involved, the federal government should have no role whatsoever. Putting it bluntly, where does the government of the United States have the Constitutional power to prevent Nevada from deciding that its public policy favors allowing its citizens to wager online with other individuals who are also physically located in Nevada?

Even when interstate commerce is involved, the federal government should not be interfering if legislatures in Nevada and Michigan, or Queensland, should decide that it is alright for their citizens to gambling online with operators licensed and operating in the other state.

## VII. The Second Emerging Major Fight: States v. States.

The police power that all state governments have cuts two ways. It is well established under international law that a state's police power within its own borders is virtually absolute. In addition a state may exercise power over its own citizens while they are abroad, so long as there is no interference with the foreign country's sovereignty. But states, even in the same federation, are not allowed to interfere in the internal affairs of other states. A government can often impose its morality on citizens of another government, but only when those foreigners are physically within its borders.

**A state cannot reach out and impose its view of what is moral and what is not on citizens of foreign states, who are residing in their own home states B but it can act to protect its own citizens.**

**As the cases from the European Court of Justice show, states have enormous power when it comes to creating restrictions on gambling within their borders. This includes the power to make it a crime for its own citizens to place bets, or for anyone to accept a bet from one of those citizens. Of course, a state would first have to enact a law which would expressly make using the Internet for gambling purposes illegal.**

**There is a strong presumption that a government has not reached out beyond its borders in enacting a statute. Any state or federal prohibition on Internet gambling or the transmission of gambling information via computers will be presumed to include only activities taking place within the borders of that particular government entity. For example, U.S. federal criminal statutes do not apply to activities taking place entirely outside of the territorial boundaries of the United States, unless the statute itself contains an extremely clear statement of congressional extraterritorial intent. This strong presumption against extraterritorial application of federal criminal statutes has been part of American law for decades. In 1922 the United States Supreme Court reaffirmed this doctrine: If Congress intends a criminal prohibition to apply outside the United States, it must say so in the statute. The only exception is the limited class of offenses committed directly against the federal government itself, such as the foreign theft of U.S. government property. Federal courts have consistently halted criminal proceedings when it was shown that the conduct was outside the United States and no statement of Congressional intent to intrude on the sovereignty of an independent nation could be found in the statute. For example, in United States v. Velasquez-Mercado, an indictment for a federal sex crime was dismissed, because the allegations were that the act occurred outside the U.S. and the plain language of the statute did not clearly indicate an extraterritorial reach. And in Ito v. United States, the Ninth Circuit Court of Appeals overturned a defendant's conviction for bringing aliens into the United States where defendant's conduct occurred outside U.S. territorial waters.**

**United States federal civil statutes carry the same heavy presumption that they are limited to acts committed within the territory of the United States. In the past, courts have been more willing to look beyond the language of the statute itself in civil cases to see if the legislative history reveals a clear Congressional extraterritorial intent. However, in 1991 the United States Supreme Court declared that the requirement that there be a clear statement of Congressional extraterritorial intent in the statute itself applies to civil as well as criminal laws. This reflects the growing recognition of**

international law and the impact American laws can have on the sovereignty of foreign nations. A strict drafting standard is necessary to avoid unintended clashes between our laws and those of other nations which could result in international discord. @

There is an equally strong presumption against extraterritorial application of state statutes. State law is identical to federal law in presuming that a legislature does not intend for its enactments to apply to activities occurring outside of the state's borders. Of course, in many cases states have expressly declared, by both statute and case law, that their laws do not apply extraterritorially, unless the statute in question contains an explicit statement of legislative intent.

Interestingly, one of the principal authors of '1.03 (A Territorial Applicability @) of the Model Penal Code, Herbert Wechsler, used gambling as an example of the need for legislatures to be particularly explicit if they intend a criminal statute will apply to extraterritorial conduct:

... if this state attempts to reach conduct outside the state or conduct involving the result which is going to occur in another jurisdiction where it would not be an offense, it is only where the legislative purpose plainly appears to reach conduct in this state, regardless of where the result is to occur, that the statute is to apply . . . If the state wants to make gambling criminal, for example, when the wager is to be placed in another state B which it may want to do B it may do so, so far as that is constitutional; but you read the statute carefully to see that the legislature really meant to do that and was not only dealing with wagers within the state.

Nevada has enacted a law which expressly makes it a crime in Nevada for a person located anywhere in the world to accept a wager over the Internet from a person physically located in Nevada. This statute meets the test for overcoming the presumption that a law will not have extraterritorial reach. However, it fails an additional constitutional test, at least to the extent it impacts legal Internet operators in the United States.

The Commerce Clause of the United States Constitution has been construed by the United States Supreme Court as barring states from interfering with interstate and international commerce under certain circumstances. "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States ..." This constitutional barrier to a state attempting to infringe on commerce from other states and foreign nations is known as the Dormant Commerce Clause. Dormant Commerce Clause jurisprudence forbids individual states from regulating within their borders

commerce that is essentially national or international in character in such a way as to "burden" interstate or international commerce.

The dormant Commerce Clause issue arises when Congress has not spoken clearly on a particular issue. This is the case with Internet gambling. In their constitutional law treatise, Professor John Nowak and Professor Ronald Rotunda summarize this area of jurisprudence by stating that local legislation that thwarts the operation of the common market of the United States exceeds the permissible limits of the dormant Commerce Clause. Because some states might opt to legalize on-line gambling legislation in other states aimed at prohibiting on-line gambling undoubtedly would disrupt the common market of the United States and violate the dormant Commerce Clause.

Applying state law to Internet gambling risks the Internet activities being subjected to conflicting laws, imposed by different states with different priorities. A related concern is the risk that a tiny, conservative state or country, or even county or city, could effectively impose its standards of morality on the rest of the planet. This threat materialized in 1995, when CompuServe temporarily blocked access worldwide to over 200 Internet sites, after a single prosecutor in Munich, Germany, alleged that the sites contained sexual and other material that violated German law.

Nevada's statute very likely violates the Dormant Commerce Clause, because it is so clearly designed to protect Nevada gaming interests at the expense of all out-of-state competitors. Other state prohibitions on Internet gambling would also be unconstitutional, if they unreasonably interfered with the sovereign powers of other states or nations. One author analyzed the Louisiana statute outlawing all Internet gambling and concluded that its language was so broad and vague that it could potentially prevent regular business transactions, like buying real estate. It would be impossible for the rest of the United States, let alone the rest of the world, conform their commercial activities to fit this new Louisiana law.

It is possible that a state, particularly one which completely prohibits Internet gambling, does have the police power to prosecute foreign operators for accepting bets over the Internet from residents of that state. The state government would have to first enact a carefully drafted statute and second be able to force any potential defendant to come physically to that state for trial. Under present law, it is almost impossible for a state to bring an overseas operator to trial. For the law of nations also holds that governments are almost never allowed to impose their criminal laws on foreign citizens in foreign States. It takes an extraordinary situation for a country, like the United States, to invade another country – say Panama – to arrest a citizen

of that country, Manuel Noriega, for violating American drug laws. Extradition is difficult; extradition treaties may cover criminal fraud, but never illegal gambling.

Even with a friendly nation, a foreign power has to use political persuasion more than legal power. When the United States decided to go after the head of the biggest illegal telephone sports betting ring in history - Ron A The Cigar@ Sacco, who made the mistake of going on CBS=s TV show A60 Minutes@ to brag about his bookie operation - the arrest was made in the Dominican Republic by police of that country. Sacco was charged with violating local gambling laws, because the Dominican Republic only allows local betting, and Sacco was taking phone bets from the Americans. He was then deported to the U.S. as an undesirable alien.

This idea of comity, that countries have to respect the criminal law, in particular, of other countries has been formalized in treaties. For example, there are a number of Mutual Legal Assistance Treaties requiring a country to exercise moderation and restraint before it attempts to unilaterally enforce its laws on foreign citizens in their home countries. Under the MLAT between the United States and the U.K., for example, the American government would be required to enter into consultations with the government of England before U.S. officials could subpoena the bank records of a U.K. Internet gambling operator. The MLAT calls for the offended government, in this case the U.S., to try civil means, non-criminal enforcement, before taking criminal-like action, such as seizing assets.

Put another way: A state which has made Internet gambling illegal can arrest its own local citizens who are making bets. But a foreign operator sitting in a foreign country and violating no law of that country probably cannot be touched. Even U.S. citizens may be safe, if they refuse to come voluntarily to the United States for trial: The U.S. does not allow true trials in absentia. Criminal defendants have the right to be present at trial under both the Sixth Amendment constitutional right to confront witnesses and the common law right to be present at trial, codified under Rule 43 of the Federal Rules of Criminal Procedure.

Knowing there is little chance of being actually convicted of a crime is little consolation for an officer or director of an international gaming company. Legitimate operators, especially individuals and companies with licenses to protect, face a serious problem. It is impossible for an Internet gaming operator to know if it is committing a crime where the bettor is, without checking the laws of every jurisdiction. Operators willing to take greater risks, or with less to lose, will take bets from everywhere, hoping that their first contact with foreign law enforcement will come in the form of a warning rather than an arrest warrant. More conservative companies and

individuals will refuse to accept a wager from any jurisdiction that has not first been cleared by their lawyers.

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END

### L. NELSON ROSE

Professor I. Nelson Rose is an internationally known public speaker, writer and scholar and is recognized as one of the world's leading authorities on gambling law. A 1979 graduate of Harvard Law School, he is a tenured full Professor at Whittier Law School in Costa Mesa, California, where he teaches one of the first law school classes on gaming law.

Professor Rose is the author of more than 300 books, articles, book chapters and columns. He is best known for his internationally syndicated column, "*Gambling and the Law*," and his landmark 1986 book by the same name. His most recent book is a collection of columns and analysis, co-authored with Bob Loeb, on Blackjack and the Law.

A consultant to governments and industry, Professor Rose has testified as an expert witness and acted as an advisor to major law firms, international corporations, licensed casinos, players, Indian tribes, and local, state and national governments, including Arizona, California, Florida, New Jersey, Texas, and the federal governments of Canada and the United States.

With the rising interest in gambling throughout the world, Professor Rose has spoken before such diverse groups as the National Conference of State Legislatures, Congress of State Lotteries of Europe, United States Conference of Mayors, and the National Academy of Sciences. He has presented scholarly papers on gambling in Nevada, New Jersey, Puerto Rico, England, Australia, Portugal, Argentina and the Czech Republic.

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## The Major Internet Gambling Case That Isn't

A recent decision by Manhattan Judge Charles Edward Ramos of the Supreme Court of New York has created a minor panic in the Internet gaming community. A company which designs software for on-line casinos saw the price of its stock plummet. Operators who had been taking bets from New Yorkers wonder whether they have to avoid the state, or perhaps the entire country. Owners of other gaming websites, who had prohibited wagers from Americans, now fear being dragged into U.S. courts if undercover cops lie about their addresses.

The decision does contain some rather startling language: A The Internet site creates a virtual casino within the user's computer terminal. @ Judge Ramos held that because the user was in New York, the licensed Antigua company could be sued in New York.

There are a few reasons not to be overly concerned about this decision. In fact, this supposedly major Internet gambling case is neither major, nor primarily about Internet gambling.

, Despite its name, the A Supreme Court @ of New York is only a trial court. The decision is important to the parties involved in the law suit, but is not of any precedence for anyone else.

, Much of the opinion involves a discussion of federal law. While intellectually interesting, the conclusions of this state trial judge are not binding.

, The A user @ was an undercover agent, who was automatically cut off when she entered her address as New York. She logged on again and this time typed in A Nevada. @ The opinion is misleading when it implies that a foreign corporation can be forced to defend a law suit in a state when its only contact with that state is created by a customer=s intentional misrepresentation.

, The fact that the operator was licensed in Antigua was irrelevant; and

, The fact that the operator=s server was in Antigua was irrelevant; and

, The fact that the operator was incorporated in Antigua was irrelevant; because. . .

This was actually a New York company doing business in New York, with principals and assets in New York. The case revolved around allegations that the

defendants sold unregistered securities through a New York boiler room operation to New Yorkers. So, of course the courts of New York have the power to seize a New York bank account and to enjoin activities which were found to have been run out of offices in New York.

Judges always write opinions as if the losing side had almost no facts or law on its side. So we do not know what evidence defendants= attorneys presented which the judge may have ignored. But we do know that Judge Ramos found the following:

The defendants Aare clearly doing business in New York...@

The corporation with the Antigua gaming license, Golden Chips Casino (AGCC@), is a wholly owned subsidiary of another corporation, World Interactive Gaming Corp. (AWIGC@). Judge Ramos found GCC was so dominated by WIGC that Ahe deemed GCC an alter ego of WIGC.@ As one example: AAll GCC top employees were hired by and reported to WIGC.@

Although WIGC was incorporated in Delaware, its entire business was operated from its headquarters in Bohemia, New York. It was from the New York office that defendants Afraudulently@ and Aactively solicited investors to buy WIGC shares.@

A court of appeals will undoubtedly find that it need not consider Judge Ramos=s discussion of Internet activities to and from Antigua, because so much of the gaming operation took place in New York.

AAll administrative and executive decisions as well as the computer research and development of the Internet gambling website were made in New York.@ AFrom their New York corporate headquarters, they downloaded, viewed, and edited their Internet casino website.@

The casino website and its servers were purchased by the New York parent company.

Most damning, Judge Ramos held that the gaming website was actually run out of New York, not Antigua. AThe use of the GCC casino website was handled from WIGC's corporate headquarters@ in New York.

AThe evidence also indicates that the individuals who gave the computer commands operated from WIGC's New York office.@

It is said that bad cases make bad law.

Judge Ramos=s decision that New York had power over these defendants and their bank account was correct. But his discussion of the Internet in general and

Internet gambling in particular is an example of unnecessary and bad law.

Let's hope no one will try to use this case to sue foreign companies which are truly not doing business in the states.

For if they do, we will have bad law making bad cases.

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## **Gambling and the Law®: Status of Gambling Laws**

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NOTE - In the spirit of full disclosure: I have been writing on legal gambling for 25 years and have been a consultant and expert witness to governments and industry in many of the legal developments discussed here. Most recently, I was appointed to the Gaming Policy Advisory Committee, created by the California State Legislature in the Gambling Control Act. The opinions and observations expressed here are my own and do not represent the official positions of any government, company or other entity.

The following are American jurisdictions having recent activity concerning legal gambling.

\* States and territories with gaming devices, including Video Lottery Terminals ("VLTs"), are marked with an asterisk: \*

! States with at least one casino (defined as having both banking card games and slot-like machines) are marked with an exclamation point: !

**UNITED STATES** - Bills to restrict Internet gambling are going further, but have not been able to make it through both houses of Congress. The question of whether the Secretary of the Interior can approve tribal casinos over a state's objections remains unresolved. In Nov. 2001, the U.S. Supreme Court ruled tribes, unlike states, must pay federal excise and occupational gambling taxes. The Court ruled federal laws against casino broadcast commercials were unconstitutional; state prohibitions may still be valid. The embarrassing National Gambling Impact Study Commission has come and gone and been forgotten; its Final Report was filled with factual errors. Sen. Harry Reid (D-Nev.) has so far stopped bills to outlaw state-licensed sports betting.

\* **ALABAMA** - Gov. Don Siegelman (D.) lost reelection by a squeaker. He opposed casinos, but supported creating a state lottery for education; the new Governor, Bob Riley (R.), a staunch conservative, opposes legal gambling. Four years ago Siegelman ousted incumbent Gov. Fob James, Jr. (R.), on the lottery issue, but conservative religious groups converged on Alabama and defeated the proposed constitutional amendment in Oct. 1999. The House is considering a bill to amend the State Constitution to allow lotteries; the real goal is six casinos to compete against tribal gaming. The Poarch Band of Creek Indians have three non-casino casinos with supposedly Class II table bingo games and gaming devices which take and dispense cash. Adult arcades and the state's four struggling four dog tracks have machines which in take in cash but pay out in tokens or coupons. A state judge has ordered the machines in the arcades closed and allowed a class action suit to recover losses to continue. The floundering dog tracks gained simulcasting through the State Legislature, but a bill allowing slot machines failed.

**ALASKA** - Ideas for video gaming have been floated, but worries that this would allow Native casinos will probably kill any deal. Natives of Alaska are not Indians under the Indian Gaming Regulatory Act ("IGRA"), but Sen. Ted Stevens (R.) proposed an amendment to allow Alaska native regional corporations to be treated as tribes. The Associated Press reported on May 11, 2003, that the state has a large number of compulsive gamblers, even though the only forms of legal gambling allowed are bingo, pull-tabs and lotteries "on such natural events as breakup on the Tanana River," run by municipalities and nonprofits. Proposals to allow cruise ship gaming and the Klawock band of Tlingit Indians to open a full casino on remote Prince of Wales Island have gone nowhere.

!\* **ARIZONA** - Prop. 202, sponsored by outgoing Gov. Jane Hull and 17 gaming tribes, won 51.6% in Nov. 2002; competing proposals from the tracks and the Colorado River Indian Tribes in the most expensive campaign in the state's history were soundly defeated. Janet Napolitano (D.), who supported Prop. 202, will be governor, defeating anti-gambling Matt Salmon (R.). Lawsuits, will, of course, continue, but the tracks have lost some political influence. Arizona's casino gaming will look much like today's, only bigger: up to 29 casinos, 998 slot machines per tribe with a statewide cap of 15,675, 100 blackjack and poker tables per casino, \$25 slots, \$500 blackjack, \$75/\$150 poker, non-gaming tribes may transfer their slot allotments. Voters approved extending the state lottery, again. The Ninth Circuit reversed a lower court, ruling the Governor can negotiate compacts. The Legislature had authorized the governor to renegotiate, although demanding the compacts deal with ATMs, credit cards, advertising to minors, a problem gambling hotline number, and a voluntary self-ban for problem gamblers. The Legislature and Governor also approved raising the gambling age from 18 to 21 for all forms of gambling.

**ARKANSAS** - Staunch anti-gambling Gov. Mike Huckabee (R.) was reelected, 52%-48%. The A.G. has approved a proposal to amend the State Constitution to allow a State Lottery and casinos in nine counties, but a court challenge remains. On Nov. 7, 2000, voters defeated, 65% to 35%, the last initiative for widespread casinos, charity raffles and bingo, and a State Lottery. Similar competing constitutional amendments had been tried in 1990, 1994, 1996 and 1999. Some gathered enough signatures, but the State Supreme Court found all but one other initiative misleading. That one lost 62% to 31% in Nov. 1999, due to the state's active religious organizations and opposition from Mississippi's casinos. Rep. Jim Lendall (D.) introduced a bill to have the state spend \$3,000 a year buying other states' lottery tickets. It did not pass.

!\* **CALIFORNIA** - In Aug. 1999, the State Supreme Court, quoting my 1986 book, *Gambling and the Law*, ruled Prop. 5 violated the State Constitution's ban on Nevada- and New Jersey-style casinos. Gov. Gray Davis (D.), the Legislature, unions and tribes put another proposal together: Prop. 1A, approved by voters on March 7, 2000, amended the Constitution to give tribes a monopoly on full casinos at almost no cost. Prop. 1A has been upheld by state (suit brought by Larry Flynt) and federal judges. The Ninth Circuit rules against a tribe that wanted even more. The Davis compact allows every tribe to have two casinos and up to 2,000 slot machines. It also has an incomprehensible formula capping the state total at anywhere from 43,000 to 113,000 slots, no limit on table games. In March 2003, tribes officially started renegotiations for more slots. Faced with an unbelievable \$38 billion budget shortfall, Davis, facing a recall election for his corruption and incompetence, is now asking the tribes to share - a little late. The Davis compact also allows a tribe to have 349 slots, or a casino in another state, and still receive \$1.1 million as a "non-compacting" tribe. Rep. Miller (D.) snuck a "Technical Correction" through Congress, allowing the landless Lytton Band of Pomo Indians to turn the San Pablo card club into an urban casino near San Francisco; suits continue. At present, more than 50 casinos with more than 50,000 slots take in at least \$3.5 billion a year. California will soon be second only to Nevada in casino revenue. Tracks also will push for slots; attendance at Golden Gate Fields dropped 40% in ten years, but voters will not approve amending the Constitution again. Advanced Deposit Wagering started in 2002; Californians can now make bets and tracks take bets (\$66.3 million in the first six months), including from other states, on horse races by phone and Internet; it has not hurt attendance at the tracks. Tribes defeated in committee a proposed ban on other forms of Internet gambling.

!\* **COLORADO** - Incumbent Gov. Bill Owen (R.) trounced his opponents. He favors the status quo on gaming and lotteries. A proposed initiative for the Nov. 2003 ballot for racinos will probably fail. Voters approved a constitutional amendment in 1990, allowing casinos in Central City, Black Hawk and Cripple Creek; but, overwhelmingly rejected adding new towns or slot machines in airports in 1992, 1994 and 1996. The 42 \$5-maximum bet casinos with blackjack, poker and slot machines in bring in more than \$600 million (there are two more on Indian reservations). Then-Gov. Romer vetoed legislation in 1997 to let dog and horse tracks have gaming machines. Widespread gray market video gaming devices pay off - when police are not around.

!\* **CONNECTICUT** - The state has compacts with two tribes, but the Legislature and reelected Gov. John G. Rowland (R.) believe, incorrectly, that they will prevent more Indian casinos by repealing the charity Las Vegas night law and simply refusing to negotiate any new compacts. The state is challenging federal recognition of two factions of Eastern Pequots as a tribe. Five more tribes are close to getting federal approval. The non-recognized Golden Hill Paugussett tribe wants a casino and a large part of the state. The state gets 25% of net slot win (nothing from table games) from both the Mashantucket Pequots and the Mohegans; so far, the state has received more than \$1 billion. The compacts lack any limits, so both casinos keep growing. Either the Mohegan Sun or Foxwoods might be the largest casino in the world: each has more than 300,000 square-feet, 6,500 slot machines, 370 table games and 40,000 daily visitors. The two casinos win more than \$1.5 billion a year, making them one of the largest casino markets in the U.S. Legal gambling has surpassed corporate income tax to become the third largest source of revenue in the state budget, behind the personal income tax and the sales tax. Connecticut's last jai alai fronton closed in Dec. 2001; Hartford closed in 1995 and Bridgeport fronton was

converted to a dog track.

\* **DELAWARE** - A 1994 law allowed each of the state's three racetracks to have up to 1,000 VLTs. The Legislature is considering adding sports betting to its racinos. The State ran an unsuccessful Lottery based on pro football games in 1976 and is thus exempt from the federal ban on sports wagering. But the Legislature defeated proposals for riverboat casinos and a casino with 2,000 slots on the New Jersey side of the Delaware River. The Legislature keeps raising the number of permitted machines. Delaware Park and Dover Downs each have the state's present limit of 2,000, Harrington has 1,151. Racinos have been good for the tracks: Large purses have made Harrington (Midway) a national leader in harness races. Three-quarters of the Lottery's revenue now comes from VLTs.

**FLORIDA** - Reelected Gov. Jeb Bush (R.) will continue his opposition to the expansion of gambling. Senate President Jim King (R.) is pushing for VLTs at the state's 32 horse tracks, dog tracks and jai alai frontons, but House Speaker Johnnie Byrd (R.) and Gov. Bush are opposed. Backers will lose millions of dollars in another doomed initiative drive for racinos. A \$17 million casino initiative lost big in 1994. Boxing promoter Don King is the latest to throw away his money. The Seminoles have four bingo halls/casinos with video gaming devices, without compacts. At least 20 casino ships operate cruises-to-nowhere out of Florida's ports. Court decisions allow the state and even local governments power over the ships; an anti-gaming bill aimed at cruise-to-nowhere operators was defeated in Aug. 2000.

**GEORGIA** - Newly elected Gov. Sonny Perdue (R.) opposed video poker and Indian gaming and is not even a fan of the state's enormously successful state lottery. The state also has charity bingo and raffles. Three gaming ships were sailing into international waters (three miles out) for day-trips-to-nowhere, but may be sunk by state law. The Kialegees in Oklahoma want to return to their traditional land and open a casino. This will not happen, because the Governor and Secretary of Interior would have to approve.

**HAWAII** - All commercial gambling is outlawed (social gambling is legal), but each year dozens of bills are introduced to legalize casinos or a State Lottery. The Legislature may approve a non-binding election on what type, if any, gambling voters want. Former-Gov. Ben Cayetano never got his statewide vote on a constitutional amendment to allow a single casino. A proposal for the state's employee retirement system and Office of Hawaiian Affairs to own a casino in Las Vegas aroused strong opposition. The Legislature may eventually approve casinos on cruise ships. In Dec. 2000, Congress amended the Johnson Act to prohibit casinos on voyages between the islands.

\* **IDAHO** - In Nov. 2002, voters gave Indian gaming a partial victory, letting tribes have 3,000 VLTs. But, incumbent Gov. Dirk Kempthorne (R.) beat Jerry Brady (D.), who was more in favor of tribal casinos. The Idaho Supreme Court dismissed a suit, alleging VLTs are prohibited by the State Constitution's ban (added in 1992 to specifically prohibit Indian casinos) on slot machines. In March 2001, the State Legislature refused to ratify Kempthorne's compacts with three tribes. In March 2002, the Ninth Circuit temporarily reinstated the Coeur d'Alenes telephone and Internet lottery. The tribe now has a 65,000 square foot non-casino casino, with bingo, 1,400 gaming machines (allegedly Class II), blackjack played with lottery cards, and mechanical horse races. Bars in Treasure Valley had to remove gaming devices in May 2001.

!\* **ILLINOIS** - Democrats won the governor's race and took control of both houses. Gov. Rod Blagojevich first approved the highest casino tax in the country, 50%; this year he and the Legislature pushed it to 70%, on adjusted gross receipts over \$250 million. Blagojevich even wants the state to own the casinos; he got a law through allowing it to keep the 10<sup>th</sup> license. Developers are canceling casino projects, scared of both the high tax rates and the uncertainty. Mayor Richard Daley wants Chicago to be the first city to own a casino, but Blagojevich says he will veto any budget that includes an expansion of gambling. The Constitution was amended in 1990 to allow the Legislature to authorize up to ten riverboat casinos, each with a maximum of 1,200 gaming positions. There is constant political pressure to expand, especially with one license and 3,500 gaming positions authorized but unused. All nine riverboat casinos ceased sailing in a day after former-Gov. Ryan signed a bill eliminating cruising. The State Supreme Court will hear a challenge to the sale of the 10<sup>th</sup> license, which could impact the dockside gaming law. In FY 2001, even before the tax hike, the state made more than \$1 billion from gambling. The state's troubled racing industry gets 15% of the casinos' adjusted gross revenue (\$1.7 billion in 2000). A proposal for slots at O'Hare and VLTs in bars will go nowhere as will the Ho-Chunk tribe's proposal for a casino near Chicago.

!\* **INDIANA** - No changes in the Legislature, which means the new high tax rate on riverboat casinos will stay. A House committee approved a bill to allow 750 gaming devices at the state's two horsetracks, Indiana Downs and Hoosier Park, and 1,500 at each OTB. A prior bill to permit racinos died after House Speaker B. Patrick Bauer discovered Albert Shumaker, who contributed \$25,000 to his campaign, wants to buy 5% of Hoosier Park. Riverboat casinos opened in 1995, after the State Supreme Court held the law constitutional. The Legislature authorized 11, the last to be in Orange County. The ten riverboat casinos will win more than \$2 billion in 2003. All ten immediately switched from cruising to dockside gambling when the law was changed in 2002, gaming win increased 24.4% in the first month, and they now are able to be open 24/7. Riverboat admission charges help subsidize the state's horse racing industry. Gary mayor Scott King thinks, incorrectly, that the city can get a tribal casino by a settlement of land claims of the Miami tribe of Oklahoma. A study released in 1999 found gambling is the state's fifth largest source of revenue. The Senate voted to allow candidates to accept contributions from casino owners, but the House killed it. The Legislature still won't let the State Lottery offer Keno.

!\* **IOWA** - By a landslide, voters in Nov. 2002 opted to keep casinos and racinos for eight more years, in all 11 counties that had the issue on the ballot. Slots are legal at one horse and two dog tracks, in three Indian casinos and on ten riverboat casinos. Gross gaming revenue is close to \$1 billion a year. In June 2003 another county, Worth, voted to allow riverboats. Gambling is the state's fourth largest source of income and Republican legislators are looking at allowing three more casinos and video poker and table games at tracks. The U.S. Supreme court overruled the Iowa Supreme Court, and held it was constitutional to tax racino slots at a higher rate (36%) than riverboat casino slots (20%). The successful Prairie Meadows makes 98% of its revenue from slots. The National Indian Gaming Commission took the unusual step of closing the Meskwaki's casino due to the tribe's internal political fighting. Gov. Vilsack (D.) fired most of the Racing and Gaming Commissioners for exceeding their authority when they passed regulations that prohibited casinos from expanding, banned credit card ATMs and barred new licenses; but he let the regulations stand. A court ruled the Commission had exceeded its authority. More cities are looking into casinos, if a moratorium on new licenses is lifted. Only

the State Lottery, not charities, can sell pull-tabs.

!\* **KANSAS** - Pro-gambling Kathleen Sebelius (D.) defeated anti- Tim Shallenburg (R.) for governor. Bills to expand gaming have been introduced, from slots at tracks and Lottery outlets to a casino at Dodge City's Boot Hill Museum. The Legislature probably won't pass any, though the Senate almost approved allowing full casinos in all 105 counties. Prior attempts to put slots at the state's two dog and one horse tracks failed. Camptown Greyhound Park closed, again; but may reopen, if it can have slots. In Summer 2000, Greyhound Park in Wichita opened a drive-through betting window. Tribes want to keep their monopoly; they operate four casinos, under compacts, at White Cloud, Mayetta, Horton and Powhattan. Although the compacts were reported to exclude electronic gaming devices, tribal casinos have slots as well as table games. The Delaware Tribe, forcibly removed to Oklahoma around 1868 but with no reservation, wants to move back to Lawrence to open a casino. In a highly questionable move, the U.S. Dept. of Interior approved a casino for the Miami Tribe, despite vocal opposition from former-Gov. Graves. The state has filed suit. The Legislature renewed the State Lottery in 2001, which would otherwise have expired in 2002.

**KENTUCKY** - The Legislature remains split, with Republicans controlling the Senate and Democrats the House, stymying Gov. Patton's less-than-whole-hearted push for casinos or racinos to help fix the state budget. Previously, he proposed, without endorsing, up to 14 small state-owned casinos on its borders, on a local-option basis. A state-commissioned independent study instead recommended eight casinos near major cities. A proposal for VLTs to save the state's racetracks, facing competition from neighboring states' riverboat casinos, created heated debate in the Legislature, but could not get out of committee in 2002 and will probably fail again in 2003. Rep. Tom Burch proposed Kentucky get a state submarine to sink Indiana's riverboat casinos. A statewide referendum to amend the Constitution to bring in casinos did not pass, due to church opposition. Kentucky charity bingo is bucking the national trend by growing despite competition from nearby casinos. Kentuckians spend more than \$1 billion each year on out-of-state gaming.

!\* **LOUISIANA** - Former Gov. Edwin Edwards was convicted of racketeering for manipulating riverboat casino licenses - I was designated an expert witness by the U.S. Dept. of Justice. No major changes in the Legislature. Yet another proposal for more slots, this time at fair grounds. On April 1, 2001, cruising not only ended, it became illegal for riverboats to leave their docks. But in August 2002, the Louisiana Gaming Control Board rejected plans by Pinnacle Entertainment, winner of the 15th and final license, for a barge casino, similar to Mississippi's. Courts blocked a referendum for a riverboat casino in Cameron Parish. The Dept. Of Interior rejected a compact between Gov. Mike Foster (R.) and the Jena Band of Choctaw Indians to put, and tax, a tribal casino closer to the Texas border than four state-licensed riverboat casinos in Lake Charles. Patrons think employees know when slots are hot, so the Board is considering making it a crime for employees to play video poker where they work. In 2000, the State Legislature legalized telephone bets for races at the New Orleans Fair Grounds. Harrahs opened the first permanent casino in the heart of a large American city in New Orleans in Oct. 1999, four years after its temporary casino went bankrupt; it declared bankruptcy again in Jan. 2001, blaming the \$100 million minimum state tax. More than 25 million visitors spent \$1.95 billion at Harrahs and on 14 riverboat casinos in FY 2002. Some State Senators want (illegally) to tax the state's three tribal casinos. The Chitimacha Tribe use to pay an illegal tax of 6% to local

governments; now it has a compact and is voluntarily giving \$10.5 million, which, coincidentally, equals 6%. In Nov. 1996, 31 parishes voted to keep video poker machines, 33 parishes voted them out. More than 4,800 gaming devices were shut down, leaving about 15,000. Three more tracks are trying to get around the two-thirds vote requirement to add slots; Delta Downs wants 1,200; but a Senate committee has approved a bill eliminating video poker from all tracks. Truck stops now are limited to 50 machines, and they have to sell gasoline! A Senate Committee has approved raising the maximum bet to \$20 on video poker machines in bars, restaurants, hotels and truck stops. The State Supreme Court upheld legislation raising the gambling age from 18 to 21. It also upheld a ban on casino contributions to political campaigns; the U.S. Supreme Court refused to hear an appeal.

**MAINE** - The Legislature approved slots for the state's five OTBs. One initiative, to let the Passamaquoddy and Penobscot tribes have a casino, made the Nov. 2003 ballot. I doubt the voters will approve. A bill was introduced to allow any organization to have casinos if the tribes win. The towns of Fairfield, Sanford and Princeton approved casinos in nonbinding elections, but 13 other towns have taken action against casinos since Spring 2002, according to [MaineToday.com](http://MaineToday.com) (11/7/2002). In June 2003 Bangor voters said yes to slots at the Bass Park track. New Gov. John Baldacci (D.), will be not nearly as anti-gambling as outgoing Gov. Angus King, but he spoke of his opposition to casinos at his inauguration. Maine has a commission to study the impacts of casinos. Charities can offer limited dice and card games, including blackjack. Some, illegally, also have video poker. A bill has been entered to make the machines legal. On Nov. 7, 2000, voters decided not to allow up to 1,500 VLTs at Scarborough Downs racetrack.

**MARYLAND** - Rep. Robert Erlich Jr.(R.) was elected governor, in a major victory for racinos. He favors putting 11,500 VLTs at the state's three existing and one planned tracks to compete with nearby Delaware's and to lessen the budget deficit. He wants the gaming tax to be 54%, which would be among the highest in the nation, although down from his original 75%. He defeated Kathleen Kennedy Townsend (D.), and replaced Gov. Parris N. Glendening, both opposed to legal gambling. So far, the Legislature has balked, although it will eventually go along, after it conducts yet another study. A statute allows phone wagers and tracks want implementing regulations; the real goal: Internet betting.

**MASSACHUSETTS** - A study found that, yes, casinos make money. New Gov. Mitt Romney (R.), new Senate Ways and Means chairwoman Therese Murray and others want Connecticut and Rhode Island to pay Massachusetts \$75 million to NOT have casinos - economically correct, politically impossible. In April 2003, the House killed bills to let tracks have slots. A bill for a full casino for Suffolk Downs near Boston or Holyoke, which voted 59% - 41% pro-casino in a non-binding referendum, won't pass. The Legislature and former-Gov. Jane Swift may have saved the state's four horse and dog tracks by allowing them to take bets on races around the country by phone. On Nov. 7, 2000, voters rejected a proposal to end dog racing. Eventually, the Wampanoags will have a casino. Then-Gov. Cellucci would only negotiate Class II gaming; in 1997, the Legislature killed a deal between then-Gov. Weld and the tribe for a casino in New Bedford, rather than on their inaccessible reservation. A court has upheld the right of local governments to regulate or prohibit cruises to nowhere. To save charity bingo, the limit on progressive jackpots was raised from \$500 to \$3,000.

**!\* MICHIGAN** - Jennifer Granholm (D.) edged out Dick Posthumus (R.) for governor, neither was in favor of expanded gambling. The House has approved turning the state's seven horse tracks into racinos. In Nov. 1996, voters approved three casinos for Detroit, despite the strong opposition of then-Gov. John Engler - the first time in American history that citizens of a state voted to allow new high-stakes casinos in the face of active opposition. On July 29, 1999, Detroit became the largest city in the U.S. to have a land-based casino - the MGM Grand's \$235 million temporary facility has 75,000 square feet of gaming, 2,300 slots and 80 table games. Detroit's three casinos, MGM Grand, Motorcity and Greektown, took in more than \$1 billion in 2002. In Jan. 2002, a Sixth Circuit panel ruled 2-1 the preference given two companies unconstitutional, but the trial judge still said the licenses do not have to be rebid. Michigan signed compacts with 11 tribes, resulting in 17 casinos; Soaring Eagle Casino has 4,300 slots and 100 table games. Charity bingo revenue is down 26% in six years; so, the Legislature approved progressive jackpots. The limits on "Millionaire Parties," casino nights, were raised from a \$2,000 prize limit to total chip sales of \$15,000. A new statute had to be amended to make Internet gambling illegal, after I wrote that the first version accidentally legalized online wagering conducted by the State Lottery and state licensed operators.

**!\* MINNESOTA** - The U.S. Senate race between the Norm Coleman (R.) and former Vice-President Walter F. Mondale (D.) attracted international attention. Little noticed was another Republican victory: Tim Pawlenty won the gubernatorial race with only 44%. The state has 18 Indian casinos. The Legislature will consider proposals, which will go nowhere, to legalize sports betting (in violation of federal law), allow slots in bars, and open state-owned casinos, including one for the Minneapolis-St. Paul International Airport, limited to passengers, and a state-tribe casino for St. Paul. The first state-licensed card club opened April 19, 2000, at Canterbury Park in Shakopee, doubling the track's net income, even though it competes with the huge Mystic Lake Casino. The Legislature refused to allow a casino Constitutional amendment on the ballot, so its 50 tables offer only poker and player-banked games, like pai gow poker - no blackjack or slots; although a bill to allow 2,000 slots is pending. Maximum opening bets \$30, raises \$60. Bar games, particularly charity pull-tabs, are very big: about \$1.5 billion in sales in 1999.

**!\* MISSISSIPPI** - Who would have predicted Mississippi to become the third largest (non-Indian) casino state? Gross gaming revenue is \$3 billion, about 80% from more than 35,000 slot machines. State law allows an unlimited number of dockside and riverboat casinos; 41 opened, 29 remain (12 on the Gulf Coast and 17 along the Mississippi). Casinos spent \$3.6 billion in 2001, a major factor in the state's economy. This does not include the politically powerful Choctaw Tribe's large Silver Star and Golden Moon casinos. The State Supreme Court ruled that race and sports books are still illegal, despite provisions in the Gaming Control Act specifically allowing "sports pools." It also threw out the third attempt by casino opponents, led by "anti" activist Elizabeth Stoner, to ban gaming by initiative. A regulation allows casino employees to play everything but progressive slots. The Court reiterated that amusement machines which dispense valuable coupons by chance, upon the insertion of a coin, are illegal slot machines.

**!\* MISSOURI** - Faced with a budget crisis, Gov. Bob Holden (D.) tried and failed to raise riverboat casino taxes from the already high 29.5% by 2% and entrance fees by \$2, and to eliminate the \$500 loss limit. State Republicans took control of the state House for the first time in nearly 50 years. They have not shown any interest in large tax increases and the Missouri

Gaming Commission criticized the economics of Illinois' new higher tax on its most successful casino investments. The Commission has also consistently found the \$500 loss limit makes Missouri's casinos less attractive to patrons. There are now 11 casinos, with gross gaming revenue of \$1.28 billion in 2002. It took four elections to make casinos legal. In early 1994, the State Supreme Court nearly destroyed the state's new riverboat casino industry by limiting boats to games with some skill. The Nov. 1994 election amended the State Constitution to allow slot machines, keno, bingo and other games of pure chance. The Court then ruled casinos must be on a river (Station Casino agreed to pay a \$75,000 fine for using city tap water for its "river"). The voters amended their constitution once again, to make boats-in-a-moat legal. An initiative to allow fraternal and charitable groups to have slots has apparently been abandoned. The State Lottery has introduced a Keno-style game in restaurants and bars.

\* **MONTANA** - A proposal by Butte legislators, "Destination Montana," to create a "music and entertainment district," with 10 or 11 casinos, is getting support from the state's tribes. Under the present plan, the tribes would co-own only one casino, which might not stand up in court. Bucking a national trend, the Legislature decided not to raise taxes on video poker and keno machines, which are more than 90% of the state's legal gambling. More than 1,600 locations have up to 20 devices each, totaling more than 16,000. There are more video keno than video poker machines; maximum wager is \$2, maximum payout, \$800. Six tribes have compacts, each can have 100 video gambling machines with \$1,000 payouts, but no banking card games; two other tribes have not signed. A bill to exempt casinos from anti-smoking laws is pending. State law allows a dozen forms of gambling, including card clubs, sports pools, Calcutta pools and fantasy sports leagues. Religious activists failed in their attempt to put a proposed constitutional amendment on the Nov. 2000 ballot, which would have outlawed all gambling. They needed only 39,724 signatures, but they could not get even half that number. The Legislature approved staying with PowerBall, including taking bets from other nations.

!\* **NEBRASKA** - Pro-gambling Stormy Dean (D.) was wiped out in the gubernatorial race by anti-Mike Johanns (R.), who would allow only a small number of additional casinos at most, and no more slots. Bills to put Indian and private casinos on the ballot died, but will be reintroduced in Jan. 2004. The State Supreme Court barred a proposed constitutional amendment to allow VLTs in keno parlors and bars from the Nov. 2002 ballot. The Santee Sioux's casino has court-approved video pull-tabs. Charity bingo, keno and pickle cards dropped from \$332 million in 1995 to \$254 million in 2000. A 1996 casino initiative failed, because many signatures were from people who were dead. The State Supreme Court declared phone bets illegal.

!\* **NEVADA** - Joe Neal (D.) ran on a platform of raising casino taxes - in Nevada! He got 22% of the vote, beating "None of the above." In Jan. 2003, Gov. Kenny Guinn (R.) announced that gaming taxes will not be raised from 6.25%, the lowest in the country. The Legislature and Governor gave the Gaming Control Board power to decide whether Nevada licensees can open Internet casinos (tax would also be 6.25%, plus a \$1 million fee for two years) and accept bets from the U.S., but the Board fears the federal Wire Act and other states' laws. A bill to create a State Lottery, with tickets sold only in casinos failed. But Las Vegas casinos introduced a keno-lottery game with progressive jackpots, despite lotteries being prohibited by the State Constitution. Mayor Oscar Goodman wants a Las Vegas city lottery. Casinos can now open private salons for high-rollers. The Legislature has voted, again, for account wagering, so race

books will soon be taking phone and computer bets from patrons in other states. The Board promulgated regulations against kiddie-themed slots. Among the first to pass, with restrictions, was "Addams Family" and "Saturday Night Live" slots. A bill to require casinos to pay slot jackpots, even when the symbols lined up due to a malfunction, could not pass. In a P.R. move, the state lifted the ban on betting on local sports teams. Regulators have proposed putting a \$550 cap on bets on college sports; there are 150+ licensed sports books. The State Supreme Court ruled unpaid casino markers are checks under Nevada's criminal bad checks law and District Attorneys have become aggressive casino bill collectors. Casinos won \$9.4 billion in 2002 (down 0.26% from 2001), more than half from slot machines. For the first time anywhere in Nevada, in 2000, gaming brought in less than half of total revenue on the Las Vegas Strip. There are approximately 200,000 slots in the state; most are in the approximately 243 casinos. The Nevada Gaming Commission now limits new "restricted licenses" (15 slots machines maximum) to convenience stores, supermarkets, drugstores and bars; a new casino must have a 500-room hotel.

**NEW HAMPSHIRE** - Outgoing Gov. Jeanne Shaheen (D.) lost her U.S. Senate race to former Presidential speech-writer John Sununu (R.). The Legislature, which blocked Shaheen's push for VLTs at the state's four (three dog, one horse) tracks, did not change. New Gov. Craig Benson (R.) opposes legal gambling. State law allows video poker machines, but only if they do not pay off. Getting caught gambling became a felony on Jan. 1, 2000; so, social clubs have turned in their supposedly non-gaming devices. Manchester alone lost \$1,500 per city license for 344 video poker machines.

!\* **NEW JERSEY** - Atlantic City casinos lost a strong voice in the U.S. House when Robert G. Torricelli (D.) quit to make a disastrous run for the Senate. Another Democrat, Frank R. Lautenberg, won but will probably not be as actively against Indian and Internet gaming. The 12 casinos in Atlantic City win more than \$4.2 billion a year, making them the largest gaming market in the U.S., just ahead of the Las Vegas strip. Gov. James E. McGreevey (D.), to solve the budget problem, got casino taxes raised to 7.5% on net profits, a 4.25% sales tax on comps, and is again threatening racinos. Racinos and VLTs won't happen - casinos' political power is much greater than the State Lottery and tracks'. Then-acting-Gov. Donald T. DiFrancesco signed two bills in Aug. 2001, allowing at-home accounting wagering at up to 15 OTBs. A new state law prohibits cruises-to-nowhere. Electronic pull-tabs closely resembling slots were proposed for social clubs and fraternal societies. Gary DiBartolomeo resigned as President of Caesars Atlantic City amidst charges he lied to the Casino Control Commission about his compulsive gambling. The Legislature is considering legalizing Internet casinos.

!\* **NEW MEXICO** - New Gov. Bill Richardson (D.) wants no new Indian casinos, but would endorse another racetrack with slots. He replaces Gary Johnson (R.), who had been elected and reelected with the help of major tribal contributions. Johnson signed compacts, declared illegal, for casinos, which remained open. In 1997, the Legislature passed the Gaming Control Act, approved new compacts, but imposed a high (16%) fee. To get the bill through, fraternal organizations, charities and the state's four racetracks got slots too (Sunland Park opened with 300 slots in March 1999), and an even higher tax, 25%. In March 2001, a compromise was reached with 11 of 13 tribes with a lower revenue sharing rate (3%-8%); but suits continue. The Legislature also lowered the tax rate on non-profits, from 25% to 10%, and increased the number of slots a track may have to 600 (750 if the track obtains another track's allocation). In

2001, Johnson earmarked \$50,000 to create regulations for parimutuel betting on bicycle racing. Atty. Gen. Madrid opined it is illegal under federal law.

!\* **NEW YORK** - Incumbent Gov. George Pataki (R.), an advocate of racinos and expanding Indian gaming, beat Carl McCall (D.), who wanted a moratorium. After 9/11, the Legislature approved six more tribal casinos and 11,400 VLTs at eight selected racetracks. The problem is this all violates the State Constitution, which I believe prohibits slot machines, and federal law, because it taxes the tribes at 25% without giving them a monopoly. In June 2003, the State Court of Appeals agreed with my analysis that a compact must be approved by both the Governor and Legislature. This temporarily, at least, invalidates the compact signed by then-Gov. Mario Cuomo, which created the Akwesasne Mohawk Casino near Canada and endangers the Oneida's massive Turning Stone. The state's third casino, the Seneca's in Niagara Falls, and the St. Regis Mohawk/Park Place planned \$500 million Catskill casino/resort are not effected, because the compacts were approved by the Legislature. Albany trial judge Joseph Terisi ruled in July 2003 that a VLT is not a slot machine and are therefore constitutional and yet tribes can have true casinos. New York City won a trial, allowing it to license casino day-trips-to-nowhere. The Off-Track Betting Corp. announced plans to set up the first state-sponsored Internet betting site, but the Legislature balked. New York joined multistate Mega Millions after 9/11 and Lottery spending went up 16%, making it the biggest in the U.S. and the sixth biggest in the world. PayPal agreed to the state's demands that it report anyone using its services for online gambling.

!\* **NORTH CAROLINA** - Gov. Mike Easley wants a state lottery, and he might get it through the Legislature this time. The State Senate approved a bill to outlaw video poker. The Cherokee's bingo hall, with 2,300 machines, would be exempt; although, a State Court of Appeals decision raises questions about their legality. State law presently allows up to three machines per location with a maximum payout of \$10 in merchandise per session. Larger, illegal, payoffs are commonly reported. The Legislature passed a law increasing penalties for violators, banning the importation of new video poker machines and prohibiting children from playing. The House approved, 91-11, a bill to virtually outlaw casino cruises-to-nowhere from the North Carolina coast.

!\* **NORTH DAKOTA** - North Dakota voters in 1986 joined only three other states this century in not approving a state lottery. In November 2002, they changed their mind, voting in a state lottery with the right to join multi-state games, like PowerBall. There are four Indian casinos; Spirit Lake alone has 500 slots, blackjack, craps, poker, bingo and keno. However, the Three Affiliate Tribes were not able to launch a casino yacht on Lake Sakakawea. Hotels have charity blackjack; in 2001 the betting cap was raised from \$5 to \$25, to allow them to compete with tribal casinos, after the tribal limits were raised from \$50 to \$250. In 1996, a proposal for video gaming was defeated at the polls.

**OHIO** - Incumbent Gov. Bob Taft (R.), easily reelected, opposes slots at tracks, telephone account wagering and other proposed expansions of gambling. He beat Tim Hagan (D.), who favored putting 1,500 VLTs in the state's seven tracks to fight the state's budget crisis. A proposal to let voters in Nov. 2003 decide via a constitutional amendment died in the Legislature. An Internet bingo game for charity, limited to in-state players, opened in Nov. 2001. Casino bills and initiatives have been attempted every other year for decades and always

failed.

**OKLAHOMA** - Studies have found - surprise - that tribal casinos hurt horse tracks. The troubled racing and breeding industry is still the state's third largest, behind agriculture and oil and gas, and the Senate finally narrowly approved saving the remaining three horse tracks with VLTs. Brad Henry (D.) squeaked by anti-gambling Steve Largent to be the next governor. Henry wants the voters to decide if the state should have a lottery, the Legislature said no vote before 2004. He is also in secret compact negotiations. Voters made it a felony to engage in any activity associated with cockfighting. Twenty-three of Oklahoma's 39 federally recognized tribes have a form of gaming; the Chickasaw Nation alone has 10 locations with 1,353 gaming devices. The Absentee Shawnee Tribe and the Seminole Nation have filed suit to get slots (which are illegal in Oklahoma). The Seminoles are keeping their four casinos open, with slots machines with skill-stop buttons, even though the NIGC has issued a fine of \$8 million and ordered them closed. Some tribes offer "blackjack tournaments" where players supposedly compete against each other. Plans to open a tribal-owned riverboat casino hit rough waters. In Feb. 1998, voters resoundingly defeated a casino initiative. In 1996, voters failed to approve a State Lottery; then-Gov. David Walters' pro-Lottery forces had been far out-spent by horse-racing interests. But, the Legislature might approve a second attempt. The Quapaw Tribe is said to have the largest all-electronic bingo hall in North America, 800 seats, in Miami, Oklahoma, according to e-BingoNews. Charities cannot even win the right to hold raffles.

**!\* OREGON** - Ted Kulongaski (D.), who resigned from the state Supreme Court to run for governor, probably knows more about the laws and realities of legal gambling than any other state chief executive. As A.G., he headed the Governor's Task Force to study gambling in Oregon. The State Lottery, which runs almost 8,900 video poker machines, maximum of five per location, wants to add regular slot machines. The State Constitution prohibits casinos. The State Supreme Court ruled a store with non-gaming business and only five gaming devices is not a "casino." But the state has entered into compacts giving its tribes full casinos. Anti-gambling forces, led by the Rev. Tom Grey, failed to collect enough signatures to get a referendum on the Nov. 2000 general election ballot to outlaw video poker. Charities can run casino nights. The State Lottery takes bets on professional sports events.

**PENNSYLVANIA** - Another big election victory, which shows how far legal gambling has come. Both candidates for governor supported the idea of racinos. Ed Rendell (D.) won and immediately announced that his top priority is to lower property taxes by allowing slot machines at the state's four existing racetracks, and another four which have not even been built, with a high 35% tax. Even a newspaper, the Pittsburgh Post-Gazette, came out in favor of VLT's. The Senate approved an enormous 3,000 slots per track, with an equally large gaming tax of 46%, but the bill is mired in politics. Riverboat casinos are still a possibility. A legislator who opposes gambling proposed auctioning slot licenses to anyone. This appears to bring in more money, but actually kills the bill by eliminating track support. The State Constitution allows the Legislature to legalize casinos, but, as former-Gov. Mark Schweiker made clear, politically it requires a vote of the people. A proposal by Oklahoma and Canadian tribes to build casinos will go nowhere.

**\* RHODE ISLAND** - Donald L. Carcieri (R.) was elected governor, without taking a strong public position on gaming. A proposal for a statewide vote in Nov. 2004 on a casino for the Narragansett Tribe and the impoverished community of West Warwick died. The Lottery

Commission wants to give the state's lone dog track, Lincoln Greyhound Park, and Newport Grand Jai Alai 1,825 more VLTs to the 2,478 now run by the state, to compete with Connecticut's tribal casinos. It also wants devices which pay out in coins, eliminating the final distinction between "VLTs" and slot machines. In July 2000, the State Supreme Court overruled then-Gov. Almond's objections, finding the Legislature could delegate its power to a commission. The Legislature is quietly discussing ending jai alai.

**SOUTH CAROLINA** - In 1998, Jim Hodges (D.) beat incumbent Gov. David Beasley (R.) by not opposing video poker and by supporting a state lottery, which the voters then authorized in Nov. 2000. In 2002, Hodges lost to Mark Sanford (R.), who had opposed the state lottery. The state's 14 year experiment with video poker ended on July 1, 2000. In May 2002, the State Supreme Court held "habitual gamblers" could recover their losses from the now nonexistent slot machine operators under unique state statutes. At its height, South Carolina had 34,000 devices (Nevada has only 17,922 slots outside of casinos) and attracted more than \$2.1 billion in wagers, for \$610 million profits. Voters in 30 of 46 counties approved cash payouts in 1996. But, the Legislature then passed a bill closing down the slots unless approved at a statewide referendum; in a bizarre decision, the State Supreme Court threw out the referendum but upheld the shutdown. A judge ruled that it is now illegal to manufacture slot machines chassis in the state. In July 1999, the U.S. Fourth Circuit held state laws apply to cruises-to-nowhere. In Summer 2001, the State Supreme Court ruled casino cruises legal; but Atty.Gen. Charlie Condon issued opinions that slots used legally on casino ships violate state law when stored on South Carolina soil or used on its rivers. The Legislature and local governments are looking at restricting or prohibiting casino boats leaving South Carolina for international waters.

**! \* SOUTH DAKOTA** - Mike Rounds (R.) won the governor's race; he is basically in favor of the status quo. Native Americans across the country campaigned for A.G. candidate Ron Volesky (D.), a member of the Standing Rock Sioux Tribe, but he lost to Larry Long (R.). In Nov. 2000, voters decided, again, as in 1994, to keep VLTs. In 2001, a House committee voted to not let opponents have a third attempt. Voters also approved raising bet limits from \$5 to \$100 in the 40 casinos in Deadwood (gross gaming revenue of only \$52 million), which also raised the limits in the state's 10 tribal casinos. The higher limit doubled monthly gaming revenues. The State Lottery's 7,959 VLTs were declared unconstitutional by the State Supreme Court in June 1994, but voters reinstated them by amending the State Constitution in Nov. 1994. In May 2001, the State Fair Commission banned VLTs from state fairgrounds.

**TENNESSEE** - A very big win for legal gambling. Tennessee's charity bingo ended in scandal (including the suicide of the Secretary of State) and parimutuel betting was authorized, but no track was built. In Nov. 2002, voters amended the State Constitution allowing a state lottery. The new governor, Phil Bredesen (D.), supports the lottery and in June 2003, the Legislature finally went along. This means 48 states and all territories of the U.S. will now have some form of commercial gambling. Strong religious opposition did not develop, because the political spotlight was on other races. The State Legislature approved a bill to block casino gambling, which would require a constitutional amendment in any case. The Memphis city council is thinking about a casino.

**TEXAS** - Incumbent Gov. Rick Perry (R.), an opponent of all gambling, especially Indian casinos, was reelected, beating pro-gaming Tony Sanchez (D.). Barry Keenan, convicted of

kidnapping Frank Sinatra Jr. in 1963, is trying to convince the Legislature to allow a casino in Austin. Like the bill to turn the Astrodome into the world's largest casino, the idea will go nowhere. The Legislature is looking at racinos. John Cornyn (R.), a crusading A.G. against Indian and Internet gambling - he got federal courts to close the Alabama-Coushatta's and Tiguas' casinos - is going to the U.S. Senate. The Kickapoos also lost a case over gaming devices. The Tiguas' Speaking Rock in El Paso reopened with Class II machines, but the Fifth Circuit ruled the tribe has to get a charity bingo license. Bills to let the state's three tribes have casinos are dead until at least 2005. A former Texas A.G. ruled the Legislature could not authorize commercial casinos without a constitutional amendment. Then-Gov. George W. Bush tried to kill 8-liner slots and failed; the State Supreme Court is deciding if they fall within a loophole, while operators continue to be arrested. In July 1999, Lone Star Park joined tracks in California, Kansas and Kentucky in allowing drive-through betting windows.

**UTAH** - In Feb. 2001, the State Legislature killed a bill that would have required State Lottery advertisements to boldly display the words "void in Utah."

**VERMONT** - James Douglas (R.), did not take a strong position publicly on gambling while campaigning for governor. But he now opposes expanding gambling, even simulcast. A bill to allow casinos on railroads didn't leave the station. A racetrack in the southern part of the state is campaigning hard for slot machines and a bill to allow full casinos is pending.

**VIRGINIA** - Casino bills are routinely defeated. In 1994, a riverboat casino bill sank under the weight of excess baggage, when Disney's proposed historic theme park got tacked on. Proposals to bring race tracks to northern Virginia were attacked by state legislators as "gambling parlors masquerading as legitimate businesses."

!\* **WASHINGTON** - Bills have been introduced to allow slots in bars, restaurants, card rooms, bowling alleys, bingo parlors, and, of course, race tracks. Twenty tribes have casinos, only one was grandfathered-in by IGRA with true slots. Voters turned down proposals for tribal slots in 1995 and 1996. But the tribes now have 18,900 slot-like VLTs, as well as linked bingo machines. The Colvilles have agreed to give up their true slot machines for up to 4,800 of these devices. In an attempt to level the playing field, the Legislature allowed privately owned cardrooms to have house-banked blackjack. There are now more than 40 mini-casinos. The State Gambling Commission is debating increasing betting limits, while Gov. Locke (D.) supports bills to limit their growth and a few cities are considering bans.

\* **WEST VIRGINIA** - State law allows casinos in historic hotels, with players restricted to registered guests. The catch - local voters have to approve. Greenbrier rejected the idea in 2000; Huntington voters did the same in 2002. Gov. Bob Wise (D.) succeeded in his campaign to legalize and tax video poker machines. A federal judge dismissed a challenge, saying the suit should be brought in state court. There were around 13,500 gray market machines. On Jan. 1, 2002, this changed to about 5,000 legal VLTs (top bet \$5) at the state's four tracks (2 greyhound and 2 thoroughbred); and five max (there's already a movement to raise it to 10) in bars, clubs, restaurants, fraternal organizations, and even walled-off parts of grocery stores (slots at gas stations, grocery and convenience stores are supposed to be illegal). Showboat sued to exercise its option over Charles Town Racetrack, contending coin-drop video slot machines turns the track into a casino. Now there's a move to bring in table games, which will not get through the

Legislature. Newly-built tracks may not have gaming devices. Former-Gov. Underwood let a bill become law without his signature, allowing VLTs to accept coins. Mountaineer Racetrack and Gaming Resort would like to have telephone account wagering.

!\* **WISCONSIN** - Jim Doyle (D.), who favors expansion, defeated anti-gambling Scott McCallum (R.). Ironically, this may lead to less gambling: Gov. Doyle immediately renegotiated two compacts, which so favored the tribes, including eliminating any expiration dates, that the Republican-controlled Legislature filed suit. The State Supreme Court might rule that all compacts are invalid. Tribes operate 17 casinos (all with slots, most also have blackjack). The original compacts began expiring in 1998, but were mostly renewed when tribes agreed to raise the gambling age to 21 and the state's share from \$400,000 to \$20 million a year. The State Lottery wants VLTs. The Legislature lowered the punishment for a tavern caught with five or fewer video gambling machines to a \$500 fine. In Nov. 2000, voters in Beloit approved while those in La Crosse County rejected non-binding referendums for tribal casinos.

**WYOMING** - Newly elected Gov. Dave Freudenthal (D.) had not taken a strong public position on gambling, but he signed into law a bill allowing at-home betting on horse races; five more pro-gambling bills were introduced in the Jan. 2003 session. Outgoing-Gov. Jim Geringer and the Northern Arapaho Tribe went through all steps in IGRA, but Geringer rejected the mediator's decision that the state had to sign a compact allowing a high-stakes casino. Interior Secretary Gale Norton will create the regulations, and the state will undoubtedly sue. An initiative to allow full casinos was defeated 2 to 1 in Nov. 1994. State law allows limited sports betting.

**AMERICAN POSSESSIONS:**

**AMERICAN SAMOA** - Proposals for a land-based casino and cruise ship gaming were considered and rejected by the Legislature.

**DISTRICT OF COLUMBIA** - A riverboat casino initiative failed to get enough legitimate signatures: Of 45,000 signatures gathered, fewer than 15,000 were from voters. "Monte Carlo" nights for charities are a big business.

!\* **COMMONWEALTH OF THE NORTHERN MARIANAS** - Casinos with slots are legal on Tinian. Japan is seriously considering legalizing casinos, which would devastate the business.

\* **GUAM** - Slot machines are illegal. In Nov. 1996, an initiative to allow full casinos to compete with those on the nearby Northern Marianas was defeated at the polls.

!\* **PUERTO RICO** - Commonwealth-licensed full casinos with a strange twist: The government used to own the slot machines. A movement to privatize developed in 1996.

!\* **VIRGIN ISLANDS** - The territory is the first U.S. jurisdiction to issue licenses for Internet gambling websites. Local voters approved the concept of legalized casinos in a non-binding referendum in Nov. 1994. The Legislature agreed, and the first licensed land-based casino

opened in St. Croix in April 2000. The Legislature voted to allow cruise ships calling in St. Thomas to keep their casinos open while in port, provided the ship remains docked beyond 6:00 p.m.

## I. NELSON ROSE

Professor I. Nelson Rose is an internationally known scholar, public speaker and writer and is recognized as one of the world's leading authorities on gambling law. A 1979 graduate of Harvard Law School, he is a tenured full Professor at Whittier Law School in Costa Mesa, California, where he teaches one of the first law school classes on gaming law.

Professor Rose is the author of more than 300 books, articles, book chapters and columns. He is best known for his internationally syndicated column, "*Gambling and the Law*®," and his landmark 1986 book by the same name. His most recent book is a collection of columns and analysis, co-authored with Bob Loeb, on *Blackjack and the Law*.

Professor Rose is currently working on two books, which will be published in 2002. He is co-authoring the first casebook on gaming law, *Gaming Law: Cases and Materials*, for Matthew Bender, and, for Mary Ann Liebert Publishers, *Gambling and the Law*®: *The Law of Internet Gambling*.

A consultant to governments and industry, Professor Rose has testified as an expert witness in administrative, civil and criminal cases in the U.S., Australia and New Zealand, and has acted as a consultant to major law firms, international corporations, licensed casinos, players, Indian tribes, and local, state and national governments, including Arizona, California, Florida, Illinois, Michigan, New Jersey, Texas and the federal governments of Canada and the United States.

With the rising interest in gambling throughout the world, Professor Rose has spoken before such diverse groups as the F.B.I., National Conference of State Legislatures, Congress of State Lotteries of Europe, United States Conference of Mayors, and the National Academy of Sciences. He has presented scholarly papers on gambling in Nevada, New Jersey, Puerto Rico, England, Australia, Antigua, Portugal, Italy, Argentina and the Czech Republic.

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## The Law of Internet Gambling

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### I. Gambling online.

#### A. Individuals may make wagers from any computer with a modem.

1. Greatest concern are the use of a personal computer ("PC") from home or office.
  - a. Can the operator be trusted?
    1. Is the game honest?
    2. Is the financial transaction secure?
    3. Has the operator connections with organized crime?
  - b. Gambling creates dangers for society. Can the law --
    1. Minimize lost work and school time?
    2. Protect players from themselves, especially
      - a. Problem gamblers?
      - b. Minors? Mark Griffiths, Adolescent Gambling (1995).
    3. The Internet itself may be addicting, as are video games. Engaging gambling games compound the problem. Mark Griffiths, Presentation to National Research Council (Sept. 1, 1998).
  - c. Are criminal laws being broken by the bettor? Operator? Server? Financier? Site developer?
  - d. Older, established gambling businesses, especially the slower forms, such as pari-mutuel wagering on races, have difficulty competing with technologically advanced gaming machines.
    1. States have direct financial interests -- legal gaming paid \$16.8 billion in state taxes in 1996.
    2. The livelihood of hundreds of thousands of workers depends upon legal gaming.
    3. Does government have a legitimate role in keeping alive obsolete businesses? The gaming market is almost never a true

- free market, due to artificial government barriers.
2. Most operators have sites on the World Wide Web and are contacted by dialing a server, such as America Online, using the PC's modem.
    - a. The best list is Rolling Good Times Online, [www.rgtonline.com](http://www.rgtonline.com).
    - b. Restrictions range from mere written warnings to "check you local laws" and "you must be over 18" to Finland's requiring players have a local bank account (besides being entirely in Finnish).
    - c. Some computerized wagering systems, such as YouBet!'s arrangement with Pennsylvania's tracks, avoid servers and the Web -- bettors' modems call the off-track betting operators' computer direct.
    - d. Other technology is being developed, such as stand-alone Internet terminals that accept cash. A Burger King restaurant in New York's financial district installed 20 computers and a T1 line and is giving 20 minutes of time for a minimum purchase of \$4.99 (\$3.29 for breakfast). Philip Greenberg, New "Combo" Meal: Dine and Surf, N.Y. Times (July 30, 1998) (emailed, no page available).
    - e. Even the PC can be eliminated: MonaCall allows cybercasino gaming from a touch-tone phone.
  3. Gambling requires consideration, so only sites that accept money wagers are included in this discussion.
    - a. Internet gambling sites require players to deposit "front money," i.e., payment in advance, by credit/debit card, wire transfer, snail-mailed check or money order, or Internet funds, like CyberCash.
    - b. Credit card transactions may take days: Operators sometimes wait until payments have cleared to prevent players canceling after losing.
      1. Gambling debts are usually not legally collectable; courts leave the parties as they find them; if the transaction has cleared, players usually cannot sue to get their money back, even if the gambling was illegal.
      2. A player who lost \$70,000 in 18 months online has filed a counter-claim against Visa and MasterCard, alleging the bets were illegal in California, and asking for an injunction. Providian National Bank v. Haines, Case No. V980858 (Superior Court, Marin County, California) (Cross-complaint filed July 23, 1998) Courtney Macavinta, Net Gambler Sues Credit Firms, CNET NEWS.COM, [www.news.com/News/Item/0,4,24561,00.html](http://www.news.com/News/Item/0,4,24561,00.html) (July 24, 1998, 4 a.m. PT).
  4. Some operators claim they are licensed by foreign governments.
    - a. Smaller countries, often island nations in the Caribbean and South Pacific, have issued licenses, usually to Americans and other foreigners.
      1. Government background checks of these gaming operations are often spotty or non-existent.
        - a. Grenada sold an exclusive license to one operator, Sports International, and allowed that operator to sell sub-licenses.

It appears the government did not check license applicants' backgrounds.

- b. However, Antigua uses the FBI, Interpol and Scotland Yard for background checks on all applicants.
  2. Government oversight of these gaming operations are also often spotty or non-existent.
    - a. Players have little guarantee that the games are run honestly, they will be paid if they win, or even that they can get their front money returned.
    - b. Again, there are exceptions. Antigua has set up an anti-fraud division to investigate players' complaints, funded by its annual fees of \$75,000 for sports betting and \$100,000 for cybercasinos.
  - b. Some operators claim that they are licensed by First World Countries, including the United Kingdom, Austria and states in Australia, to accept bets over the Internet.
    1. In most cases the laws of these jurisdictions are either silent or would seem to prohibit such bets.
    2. However, some larger jurisdictions, including the U.K., have allowed their licensed operators to accept telephone wagers from the U.S. for about 10 years.
  - c. Some governments run Internet games themselves: Online lotteries are owned by the Principality of Liechtenstein, Finland and the Coeur d'Alene tribe in Idaho.
  - d. The operator's computer may be on American soil, even if it claims to be operating overseas under a foreign license.
  5. Some operators do not even claim to be licensed.
- B. Types of gambling.
1. Sports betting -- May still have the greatest dollar volume, though there are now more casino sites online.
    - a. Betting on professional and college sports events was the first form of Internet wagering; though, operators used their websites primarily to advertise toll-free or 900 telephone numbers. Even today, more money is bet with licensed overseas sports books by phone than by computer.
    - b. Players can bet (\$11 to win \$10) on real games against the bookie, or participate in fantasy sports leagues.
    - c. Sports betting is one of the most attractive forms of at-home gambling.
      1. Bettors trust the results more than playing against an unseen computer and the outcome of wagers can be independently verified.
      2. Most Americans live in a state with a state lottery and casino gaming is legal in 29 states and U.S. territories; but, legal sports betting is not readily available.
      3. Sports betting is already associated with at-home gambling:

- placing a bet by phone (although with an illegal bookie) and watching the game on T.V. Sports betting, legal and illegal, began to boom with the broadcasting of Monday Night Football.
2. Casinos -- Blackjack, video poker and virtual three-reel slot machines, craps, roulette, baccarat, keno, pai gow poker and Caribbean Stud.
    - a. Software quality, especially speed, graphics and sound quality, vary widely.
      1. Many games are painfully slow, because of the time needed to download illustrations like playing cards.
      2. Most sites allow front-loading, putting images on the PC's hard drive with a CD or by downloading before play begins. These games play as fast and are nearly as entertaining as their counterparts played in a live casino.
      3. Some sites allow chats, so players may have social interactions with other players.
      4. The best sites turn the PC screen into a virtual duplicate of a casino video slot machine.
    - b. Minimum and maximum limits on wagers also vary widely. Even with low stakes, the fastest games can run through hundreds of dollars an hour.
    - c. Remote live play is now possible -- a patent was issued in 1998 for a casino with video cameras connected to the Internet.
  3. Casinos with "no purchase necessary" -- Dozens of sites allow players to obtain small number of chips for free.
    - a. Most play is with chips purchased by credit cards.
    - b. But the free alternative means of entry may make the games non-gambling "sweepstakes" under some state laws and maybe under federal law. See, Fed. Communications Com'n. v. American Broadcasting Co., 347 U.S. 284 (1954).
  4. Lotteries -- The largest operators are the Principality of Liechtenstein and the Coeur d'Alene Indian tribe of Idaho.
    - a. Games vary from passive, once a week drawings to instant tickets, indistinguishable from slot machines.
    - b. Unlike traditional lotteries, many games do not have a pooling of players' funds to create the prize.
  5. Bingo -- Often connected with an Indian bingo hall.
    - a. True bingo -- at-home players play their cards online with and for money against other player online, or conceivably against other players both online and in real bingo halls.
    - b. Proxy play -- at-home players are represented by a player or computer acting as their agent in a live game played in a bingo hall.
      1. Future play -- Players buy a card, which is then played on their behalf in a live game.
      2. Past play -- Players buy a card and watch a bingo game on T.V., which was actually played hours before. A tribe obtained an

injunction allowing it to offer at-home proxy play of Megabingo, on the theory the game is being played on Indian land, as required by federal law, and the televised game was not relevant, because players did not have to watch or participate.

- c. Free -- Like other games, bingo may be played with no purchase necessary, if the prize is put up by a sponsor, similar to a promotional sweepstakes. In January, 1999 one site reported having 2,849 players competing for a \$700 jackpot. [www.gamesville.com](http://www.gamesville.com), reported at [www.rgtonline.com/gamespage/artlisting2.cfm/3069](http://www.rgtonline.com/gamespage/artlisting2.cfm/3069) (Feb. 18, 1999).
  - 6. Off-Track Betting ("OTB") -- Players may bet on horse races and dog races.
    - a. OTB, in its broadest definition, is betting on a race not taking place where the bettor is. Simulcasting allows the bettor to see the distant race live.
    - b. OTB was the first legal gambling by wire. It began with intrastate intertrack wagers only when both tracks had races, then betting was allowed at fairgrounds and other tracks which were not having races, then intertrack interstate and finally stand-alone OTB parlors.
    - c. Live horse racing is slow, with 20 minutes between races. Allowing bettors to wager on races taking place at other tracks creates non-stop betting action.
    - d. There is no reason for bettors to be physically present; although, they like to see the races on a screen.
    - e. Computers have been connected with handicapping races for decades.
    - f. As with sports betting, the outcome of wagers can be independently verified.
  - 7. Poker -- Players play against each other online, either for play money, AOL has a poker room, or for real money.
- C. Size of the industry.
- 1. 282 sites were listed on Rolling Good Times on February 13, 1999, as accepting real-money wagers. However, this includes dozens which may appear to be independent, but may actually be operated by a single company or its affiliates. See, Bigham's Viewpoint, "Internet Clogging Up With Casinos," at [www.wheretobet.com/index.html](http://www.wheretobet.com/index.html) (April 22, 1998). Many of these are "no purchase necessary" casinos.
  - 2. The figure most frequently heard is \$10 billion a year in revenue for online gaming by shortly after the turn of the century.
    - a. The number comes from two sources:
      - 1. Frank Feather, futurist, 1996 World Gaming Congress & Expo keynote speech, predicted that alternative delivery methods like the Internet could reach 20% of the industry's \$50 billion North American revenue within ten years.
      - 2. Jason Ader, a senior gaming analyst with Smith Barney, May 1995, quoted by the Chicago Tribune as estimating at-home wagering could become a \$10 billion industry.
    - b. To generate \$10 billion in revenue would require that \$100 billion be

wagered each year.

- c. Although the rate is constantly increasing, the current volume of gambling on the Internet appears to be in the range of less than \$2 billion, generating revenue of no more than \$200 million. I derived this estimate from the little public information available from Internet operators.
  1. Although growing exponentially, commerce on the Internet as a whole is still not very large, compared to traditional markets.
    - a. Online sales to Americans of all products and services first topped \$1 billion in 1997. Newsweek (Jan. 12, 1998). The Home Shopping Network, a comparable media, passed the \$1 billion mark in phone-in orders two years earlier.
    - b. The Los Angeles Times reported Internet sales rose from \$2.4 billion in 1997 to \$8 billion in 1998. L.A. Times at C11 (Feb. 16, 1999). But, it is unclear whether this represents worldwide sales, or only the U.S.
    - c. Even if the \$8 billion is U.S. only, it is "less than 1% of the country's total retail sales. Id.
  2. eLottery, Inc., f.k.a. UniStar Entertainment (being spun off from Executone Information Systems Inc.), spent millions developing the Coeur d'Alene's US Lottery. On April 28, 1998, this Internet game had a registered customer base of about 22,000, with about 4,200 active players. Actual ticket purchases equaled approximately \$600,000 during the third quarter of 1997. By comparison, the Home Shopping Network had 4.6 million active customers.
  3. In confidential conversations I had with international lottery executives in June 1997, I was told the biggest online lottery, Liechtenstein's InterLotto, has sales of approximately \$50 million per year. This is consistent with published statements.
  4. Sports International, now called Interactive Gaming & Communications Corp., is publicly traded and thus one of the few companies that has to disclose its finances. The handle for 1996, the amount wagered by all customers, totaled \$58,482,731. 10-K, filed Ap. 4, 1997 with the S.E.C. Revenues from net wins totaled \$2,752,252. Because its costs are so great, especially its phone bills, the company actually lost money in 1996. By comparison, \$2,428,600,000 was bet with licensed sports books in Nevada in 1995.
  5. When the federal government filed its first prosecutions of Internet sports betting, the U.S. Attorneys estimated that "on-line sports betting had garnered \$600 million in gross revenues last year, up from about \$60 million in 1996." "14 Are Charged With Taking Sports Bets Over the Internet," N.Y. Times at A1 (Mar. 5, 1998). The definition of "gross revenues" is unclear.

3. Problems -- Internet gaming is relatively small and likely to stay that way for at least the next few years.
  - a. Technology -- The Internet does not meet the Americans' high expectations of what modern technology is supposed to deliver, based on their experiences with telephones, televisions, radios, microwave ovens, etc.: easy to use, reliable, instantaneous, high quality sound and graphics.
  - b. Accessing the Internet currently requires a player to expend large amounts of money and time on computer hardware and learning how to use the accompanying software.
  - c. Playing games, especially downloading images, is a slow, almost painful, process, with constant computer crashes.
  - d. Players do not trust revealing their credit card numbers on the Internet, let alone giving the numbers to some unknown gaming operator in a foreign country.
  - e. Bettors do not know if operators, or they themselves are breaking the law.
  - f. Players have no way of knowing if they are being cheated. Rolling Good Times Online has a "Dog Doo Awareness" section listing, at the time of this writing, four sites it has investigated, and found wanting, as well as a dozen more reported in players' uninvestigated complaints. Claimed cheating includes:
    1. Operators not paying off when players win. Thompson v. Handa-Lopez, Inc., 998 F.Supp. 738 (W.D.Tex. 1998) (suit alleges Internet site refused to pay \$193,728.40).
    2. Operators refusing to return players' front money.
    3. Games programmed with unfair in favor of the operator, that do not match regulated live casinos, slots and lotteries. A separate issue is whether the free games most sites supply have odds that favor players, raising expectations that are dashed when the same type of games is played for money.
    4. Operators disappearing with investors' money.

D. What type of gambling is it?

1. History -- Over the centuries, governments came to realize that different forms of wagering required different controls. Until recently, the primitive state of technology made this rather easy.
  - a. Casino games are the most dangerous. The games are fast and the stakes can be high. Even without the extension of easy credit, players can destroy their financial lives. So, states and countries almost always completely banned casino games; although, there were sometimes exceptions for remote spas, open only to foreigners.
  - b. Wagering on sports events and horse races was not a widespread social problem when bettors had to be physically present at the event. The invention of the pari-mutuel machine, telephone & telegraph led to the creation of "pool rooms" in the hearts of cities, and the need for

- off-track and phone betting to be outlawed.
- c. Lotteries depend on large numbers of customers and can raise large amounts of money, so governments either licensed or ran the games. The games took weeks before enough tickets were sold to have a drawing. Bettors had to have paper tickets to know whether their numbers had been drawn.
2. Jurisdictions are free to define gambling terms as they wish. For example, courts have defined "lottery" as:
    - a. A "widespread pestilence," meaning available throughout a society, and thus much more dangerous than casino games. Stone v. Mississippi, 101 U.S. 814 (1880) (roulette is not a lottery).
    - b. A gambling game of pure chance. Harris v. Missouri Gaming Com'n., 869 S.W.2d 58 (Mo. 1994) (roulette, among other casino games lacking skill, is a lottery); Boasberg v. U.S., 60 F.2d 185 (5th Cir. 1932) (bookmaking not within federal anti-lottery statutes).
    - c. A gambling game where players need not be present to win; player participation does not affect the results. Ex parte Pierotti, 42 Nev. 243, 184 P.209 (1909) (slot machines are not lotteries).
    - d. A game where the prize is formed by pooling players' bets and not banking games. Western Telcon, Inc. v. California State Lottery, 13 Cal.4th 375, 53 Cal.Rptr.2d 812, 917 P.2d. 651 (June 24, 1996) (keno is not a lottery).
    - e. Schemes, which people of today would recognize as being lotteries, and not gambling games. Knight v. State ex rel. Moore, 574 So.2d 662 (Miss. 1990) (bingo is not a lottery).
    - f. "Any game, scheme or plan compromising prize, chance and consideration," meaning "lottery" is synonymous with "gambling." Kayden Industries, Inc. v. Murphy, 34 Wis.2d 718, 150 N.W.2d 447 (1967). A federal court ruled that Indian tribes in Wisconsin could operate casinos, because the state was operating a state lottery. Lac du Flambeau Band of Lake Superior Chippewa Indians v. State, 770 F.Supp. 480, appeal dismissed for lack of jurisdiction, 975 F.2d 515 (7th 1992).
  3. Courts are having to decide, for purposes either of legalizing or prohibiting, whether statutes dealing with one form of gambling, say "lotteries," apply to more recently invented forms, say blackjack played on a video screen. E.g., West Virginia v. Mountaineer Park, Inc., 190 W.Va. 276, 438 S.E.2d 308 (1993).
- E. Analysis of Internet gambling -- Technology is breaking down the distinctions among the various forms of gambling. Every jurisdiction is free to decide how it wants to handle gambling, including definitions of terms. But, major tests have arisen:
1. Sports betting and OTB on the Internet probably meets every anti-bookmaking statute. Some operators, like Kerry Rogers (see discussion of State v. Granite Gate Resorts, Inc. under Personal Jurisdiction), assert they

are not in the business of gambling, because they merely try to match bettors on opposite sides of sports events. This is a limited form of pool-selling, a type of bookmaking.

2. True Internet lotteries, where there is a pooling of players' wagers, are lotteries under any test.
3. Internet instant lottery games, where players bet against the house, are lotteries under the "pure chance" and "need not be physically present" tests. However, these are also banking and percentage games, because the house participates and has a percentage advantage; in some jurisdictions banking games are casino games and not lotteries.
4. Internet blackjack.
  - a. On the surface it appears to be a casino game. It is a banking and percentage game. But there is no casino, no dealer and not even any cards.
  - b. Machines are clearly involved. The Attorney General of Missouri indicted Pennsylvania residents operating a cybercasino in Granada for setting up a gambling device, the PC located in Missouri operated by an agent of the A.G. Older statutes may require that a gaming device actually take or deliver cash before it is declared a slot machine.
  - c. Since a telephone line is used, linking players' personal computers to operators' computers in foreign countries, the wagers may fall under the anti-bookmaking statutes. Older anti-bookmaking statutes often include language about wagering on contests of speed or skill. Playing a game head-to-head with a computer may not be a "contest."
  - d. Winners are determined by the host computer's random number generator, players do not have to be physically present to play, and players are not really playing a card game, but only choosing numbers -- just like a lottery.
    1. State Lotteries are offering a similar game, only played on paper, or on Video Lottery Terminals (VLTs).
    2. The very few courts that have looked at the question have decided that playing a game on a video monitor is not a lottery. The State Lotteries that run VLTs usually are allowed to do so because specific statutory or constitutional provisions have been adopted permitting these devices. See, e.g., Poppen v. Walker, 520 N.W.2d 238 (S. Dakota, 1994).
    3. Some skill is involved, assuming the online casino's programming is honest. So, Internet blackjack would not be a lottery in jurisdictions following the "pure chance" test.

## II. Federal laws which might apply.

### A. Criminal Statutes and Regulations.

1. Interstate Wire Act, 18 U.S.C. §1084 -- Elements & Analysis.
  - a. "Business of betting or wagering" only - not common players.
  - b. "Knowingly uses a wire communication facility" -- designed for

telephone & telegraph but covers Internet, unless direct uplink to satellite and downlink to home receiver.

- c. "Transmission in interstate or foreign commerce" --
  1. Explicitly designed to cover international activities.
    - a. Does not cover purely intrastate wagering.
    - b. Does not cover wagering information sent from international waters to the U.S. U.S. v. Montford, 27 F.3d 137 (5th Cir. 1994) (must have some contact with a foreign country).
  2. "Transmission" probably does cover Internet sites that passively receive instructions from players. The 7th Circuit held a ticker tape machine which could only receive, not transmit, gambling information did not fall within the prohibition on transmissions, United States v. Stonehouse, 452 F.2d 455 (1971); but the 8th Circuit held the opposite, United States v. Reeder, 614 F.2d 1179 (1980).
- d. "Of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers" --
  1. Designed to cover both actual wagers and gambling information, such as instructions and "the line," i.e. point spreads.
  2. Ambiguous whether "bets or wagers" and "information" stand alone or modify "sporting event or contest;" are Internet lotteries and casinos covered? All reported court decisions deal with bookies taking wagers on sports events and races (by telephone); no reported cases on any other form of gambling. In February 2001, Judge Duval of the U.S. District Court for the Eastern District of Louisiana specifically held that the Wire Act does not apply to Internet gambling, other than sports wagering. Consolidated class actions by players against Visa and MasterCard were dismissed. In re: Mastercard International Inc., Internet Gambling Litigation, and Visa International Service Association Internet Gambling Litigation, 2001 WL 197834 (E.D.La. 2001).
- e. "Shall be... imprisoned not more than two years" -- a felony.
- f. Exemption for "news reporting."
- g. Exemption "for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal."
  1. Designed to allow licensed Nevada race books to receive race results from other states.
  2. Specifically not intended to allow out-of-state players to make

bets across state lines. H.R. Rep. No. 967, 87th Cong., 1st Sess. 1961 (August 17, 1961), to accompany P.L. 87-216, S1656 (18 U.S.C. §1084).

3. However, at least six states allow their off-track betting operators to accept out-of-state phone wagers, under the theory that they are completely exempt because the OTB is legal, or that this exemption allows bets from any state where betting on horse races is legal. See discussion under "State Laws which might apply" supra.
  - h. Common carriers (telephone companies) required to discontinue service if told to by law enforcement agency on any level, federal, state, or local. Common carriers protected from all liability. Suit may be brought to restore service, and burden of proof is on phone companies.
  - i. Off-shore sports books are probably not protected by being licensed. Courts have ruled that Congress has the power to regulate or prohibit all interstate gambling. In Martin v. United States, 389 F.2d 895 (5th 1968), convictions were upheld on a business that took bets in Texas, telephoned partners in Nevada, and placed the bets with licensed Las Vegas sports books.
2. Conspiracy, 18 U.S.C. §371 -- A conspiracy to commit a crime is a crime itself, possibly a felony, even if the conspiracy is unsuccessful.
  - a. The general conspiracy statute requires an agreement, the purpose of the agreement must be to commit an unlawful act, at least one co-conspirator must do an overt act in furtherance of the conspiracy.
  - b. A co-conspirator may be convicted of a conspiracy that took place both in the United States and in a foreign country, even though he performed no overt act within the United States. United States v. Inco Bank & Trust Corp., 845 F.2d 919 (11th Cir. 1988).
  - c. For special conspiracy statutes, such as conspiracy to commit racketeering, no overt act is required. Salinas v. United States, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997).
3. Money laundering, 18 U.S.C. §1956 -- The most dangerous statute for Internet gambling operations.
  - a. Held to be separate crime from illegal gambling, no double jeopardy. United States v. Conley, 37 F.3d 970 (3d Cir. 1994).
  - b. Crime includes conducting a financial transaction involving the proceeds of unlawful activity, defined as racketeering, including violating the Wire Act.
  - c. Extreme punishments -- Under the Federal Sentencing Guidelines, a Wire Act violation would likely get 12 months in prison and a \$30,000 fine; a conviction for money laundering begins with a mandatory sentence of four years and can easily reach 20 years, plus a fine equal to 100% of the money that passes through the site. Paul S. Hugel, *Criminal Law and the Future of Internet Gaming*, 2 Gaming

L.R. 143 (1998).

4. Amateur and Professional Sports Protection Act, 28 U.S.C. §§3701-3704 -- Prevents any state or tribe from authorizing sports betting.
  - a. Congress grandfathered-in states with legal sports gambling.
    1. This possibly creates opportunities for Internet operators on Indian land in those states.
    2. It also may be a way to circumvent the Wire Act, which has an exemption if the bet is legal on both ends.
  - b. The statute is of questionable constitutionality, because there is no rational reason for the forms of sports wagers it allows and those which it prohibits., and even which states get special treatment and benefits.
    1. It is difficult to see how the federal government is remedying the problem when it allows the largest forms of sports wagering to continue in Nevada.
    2. Other grandfathered-in sports wagering:
      - a. Delaware and Oregon - Lotteries based on sports events.
      - b. Montana, North Dakota and Wyoming - Calcutta pools on sports events. MT.St. §§ 23-5-221, 23-5-501 (all college and professional sports); ND.St. § 53-06.1-07.3 (in-state events only).
      - c. Mississippi - "Sports pools." MS.St. §75-76-5.
      - d. New Mexico - "Keirin," pari-mutuel wagering on bicycle racing.
      - e. Washington and Montana - Low-limit sports cards. WA.St. § 9.46.0335 (no license required).
  - c. The Act is concerned with limiting the power of states and tribes to authorize sports betting and does not address sports books licensed by foreign countries.
  - d. It is unclear if the Act would prevent a grandfathered-in state, such as Nevada, from authorizing Internet sports books. The sports betting service must be "operating in" that state. See "Where does the bet take place," supra.
5. Miscellaneous anti-gaming and anti-lottery laws.
  - a. "Illegal gambling business" under the Organized Crime Control Act ("OCCA"), 18 U.S.C. §1955 -- Turns state gambling crimes into a federal offense. Requires five or more persons in business for more than 30 days or gross revenue of \$2,000 in any single day. Federal jurisdiction is based on the presumption of an impact on interstate commerce. OCCA covers everyone involved in the financial and operational side of the gambling business, but not bettors. Present state anti-gambling statutes, with the exception of Nevada and Louisiana, were not designed to get at out-of-state Internet operators and would not be a strong foundation for a §1955 charge.
  - b. The Travel Act, 18 U.S.C. §1952 -- Makes it a federal crime to travel

or use any facility in interstate or foreign commerce to carry on "unlawful activity," defined as a business enterprise involving gambling "in violation of the laws of the State in which they are committed or of the United States." The Act would seem to be limited to the transportation of physical items, but courts have held "facilities" includes telephone lines carrying gambling information. United States v. Smith, 209 F.Supp. 907 (E.D.Ill. 1962); United States v. Villano, 529 F.2d 1046, 1052 n.6 (10th Cir. 1975).

- c. Interstate Transportation of Wagering Paraphernalia ("ITWP"), 18 U.S.C. §1953 – This law is more clear than the Travel Act in being limited to physical items. However, law does cover software that can be used by illegal bookies, if shipped on discs.
- d. Lottery Statutes, 18 U.S.C. §§1301-1307 -- Broad prohibitions on importing, shipping in interstate or foreign commerce, or using the U.S. mails for lottery material; but, probably limited to physical items.
  1. Section 1301 was amended in 1994 after the Pic-A-State case, to prohibit the use of agents in other states buying out-of-state lottery tickets. Pic-A-State Pa., Inc. v. Commonwealth, 1993 WL 325539 (M.D.Pa. 1993); 42 F.3d 175 (3rd Cir. 1994).
  2. Section 1304 puts restrictions on "broadcasting" "any advertisement... or information concerning any lottery..." The Federal Communications Commission construes "lottery" broadly, as including virtually every form of gambling, but, "broadcasting" narrowly: the signal must be able to be picked up by anyone from the air and without a scrambler. Internet communications are not broadcasts.
  3. But, the F.C.C. can fine a radio or T.V. station that broadcasts advertising for Internet gambling. 47 C.F.R. §§73.1211 and 76.213.
- e. Gaming devices, Johnson Act, 15 U.S.C. §§1171-1178 -- Restricts gambling devices from being shipped interstate or on federal land. Requires the device be "designed and manufactured primarily for use in connection with gambling," which would exclude all but dedicated terminals.
6. Racketeer Influenced and Corrupt Organizations ("RICO"), 18 U.S.C. §§1961-1968 -- designed to reach the upper echelon of organized crime.
  - a. Draconian civil and criminal punishments, fines, forfeitures and imprisonment.
  - b. Covers anyone involved with an organization that commits two predicate crimes within ten years. Makes a federal crime of state felony gambling offenses. Also includes the Wire Act, Travel Act, ITWP, OCCA, money laundering and mail fraud.
  - c. If Internet gambling is illegal, the operators can be charged with RICO.
7. The Communications Act of 1934 gives the Federal Communications

Commission ("FCC") authority to regulate all interstate and foreign wire communications, broadly defined. 47 U.S.C. §§151, 153. But, the FCC has made it clear it will have nothing to do with the Internet. Federal law enforcement is thus left to the Department of Justice ("DOJ"). Pure intrastate communications are outside the FCC's jurisdiction and are regulated by the states.

**B. Recent Developments.**

**1. Proposals in Congress to amend the Interstate Wire Act.**

a. Internet Gambling Prohibition Act, author Jon Kyl (R.-Az), commonly called "the Kyl bill," first proposed as part of the Crime Prevention Act of 1995, 141 Cong.Rec. S19110-07, S19113-4 (Dec. 21, 1995); reintroduced as SB 474 (March 19, 1997), passed by Senate when attached to appropriations bill, but deleted from final version of appropriations bill, H.R. 4276, in House. Other bills: HR 4350 (Introduced July 29, 1998), HR 2380 (introduced Sept. 3, 1997). Bills have gone through many rewrites and the Senate and House proposals differ in significant details. Major features present in some or all:

1. Amend the Wire Act, 18 U.S.C. §§1081 and 1084;
2. Attempt to clarify which types of gambling are illegal;
3. For the first time, make it a federal crime (a misdemeanor, up to six months jail and a fine) to make a bet over the Internet.
4. Increase punishment for felony of being in the business of gambling and violating §1084;
5. Allow licensed OTB operators to take Internet bets, but only intrastate; details vary.
6. Exempt "closed-loop subscriber-based services."
7. Exempt fantasy sports leagues.

b. Problems with the Kyl and other bills:

1. First Amendment -- Language has been narrowed, but still covers advertising and other information.
2. Treaties requiring the U.S. to consult with foreign governments before imposing criminal penalties for acts committed in those countries;
3. Sovereignty of foreign governments may be impinged upon.
4. Enforceability -- Federal government cannot arrest:
  - a. Millions of Americans using PCs in the privacy of their own homes;
  - b. Foreign citizens operating under a government license in their own country;
  - c. Foreign governments, like Liechtenstein, when the government itself is the operator.

c. The state Attorneys General -- the most active and vocal opponents of Internet gambling. The National Association of Attorneys General ("NAAG") created a task force of 39 states in June, 1995, led by Hubert H. Humphrey III, Minnesota; James E. Doyle, Wisconsin; and

Daniel E. Lungren, California. It found six "major deficiencies" in the Interstate Wire Act and urged amendment of §§1084 and 1081 (definitions):

1. Current federal law only applies to gambling businesses. It is not a federal crime to make an illegal wager. "Add a penalty for 'casual bettors.'"
  2. The law clearly prohibits wagers on sporting events, but it is unclear whether it covers other forms of gambling, such as lotteries or Internet casinos.
  3. It is a crime to send information that aids in the making of wagers, but the law is ambiguous about receiving such information. An Internet gambling operator could claim its computers are simply passively receiving bets.
  4. The law is limited to "wire" communications; an Internet operator could get around the law by using microwave transmitters and home satellite dishes.
  5. Telephone companies, let alone Internet access providers, are not criminally liable if an illegal bookie uses a telephone line.
  6. The present law does not allow "a prospective remedy" for law enforcement. NAAG wants to add a civil remedy, similar to the Red Light Abatement laws that allow closing down brothels, since obtaining a criminal conviction against an Internet operator would be so difficult.
- d. Response by U.S. Department of Justice, "Thanks, but no thanks."
1. A unique situation: states asking the federal government to assume more power, and the feds refusing.
  2. The DOJ does not want to be in the business of arresting gamblers. The DOJ's Criminal Division sent NAAG a letter stating: "[T]he Department does not agree that federal law should be amended so broadly as to cover the first-time bettor who loses \$5, particularly when Internet gaming is expected to mushroom and federal resources are shrinking." "Moreover, we believe that the envisioned expansion of federal jurisdiction would not serve as a deterrent to Internet gaming since it is unlikely that federal prosecutions will be pursued against bettors."
  3. Under pressure from NAAG and Congressional hearings, DOJ made a showy arrest of Internet operators using laws already on the books. See below.
- e. Present operators want exemptions.
1. Legitimate Internet gambling operations want to be regulated, not outlawed.
  2. Horse racing interests --
    - a. Racing industry wants to preserve the Interstate Horse Racing Act, 15 U.S.C. §§3001-3007, which set up a

- complicated system to allow licensed OTB operators to take bets on foreign races.
- b. Some OTB operators, presently taking interstate telephone wagers, do not want to at-home bettors explicitly excluded.
  3. Indian tribes -- Only one, the Coeur d'Alene, is presently taking Internet wagers. But tribes are concerned about any infringement on their sovereignty. And many tribes have Internet linked slot machines and bingo games to protect.
  2. Criminal complaints filed by U.S. Attorney in New York City.
    - a. The first federal charges for Internet gambling were filed in March, 1998 against 14 individuals connected with six companies. All defendants claim their gambling businesses were licensed by foreign countries. All were operating openly, even taking out ads in Pro Football Weekly and other magazines. There is no allegation of any connection with organized crime.
    - b. Some commentators have said it is going to be hard to get convictions. But the federal prosecutors spent months gathering evidence, choosing only the most vulnerable defendants and framing their Complaints to make the strongest possible case:
      1. Only Americans were charged, avoiding the sticky question of whether this country can arrest a citizen of another country, who claims to be licensed by his own government. There is little dispute that the U.S. can charge American citizens with certain crimes, no matter where in the world they may live.
      2. The only form of gambling involved was sports betting. If the Wire Act covers anything, it is sports betting.
      3. The defendants were not charged with violating the Wire Act, but rather with conspiracy to violate the Wire Act. Prosecutors do not have to prove the defendants transmitted any bet by wire to another country, only that they agreed to do so and one of them did an "overt act" in furtherance of the conspiracy.
      4. Only operators and others involved in the business of gambling were charged. As a matter of public relations, it would have been awkward to explain arresting bettors, when the whole point of the anti-gambling laws is supposed to be to protect the public.
      5. The government only charged individuals who made the mistake of conducting part of their operations within the U.S.: Defendants sent envelopes with return addresses of Costa Rica, Curacao and the Dominican Republic, but with postmarks from Florida, Texas and Nevada and carrying U.S. stamps; 800-numbers had been given to U.S., not foreign, companies; defendants wrote checks on banks in this country; one undercover agent even received a \$400 U.S. Postal Money Order with a handwritten note that it was sent from Las Vegas.
      6. Every sports book took at least one bet over the telephone,

giving prosecutors a fall-back position if a court rules the Wire Act does not apply to the Internet.

- c. The immediate impact of these criminal charges was virtual panic among cyber-bettors. Foreign sportsbooks that accept bets by phone or online are barring Americans -- or closing their doors completely; apparently some operators are disappearing with the loot. The Las Vegas Sporting News reported that a sportsbook located in the Dominican Republic folded, leaving at least one player unable to retrieve \$10,500 from his telephone-betting account.
- d. The DOJ pulled off a great public relations coup. It showed it can put the fear of God into the entire industry -- using laws already on the books; thus, that the new laws are unnecessary -- at least for the easy cases.
- e. Many defendants have accepted plea bargains, but at least one has made motions to dismiss. United States v. Jay Cohen, Indictment No. 98 CR 294 (TPG) (S.D.N.Y. 1998).

### III. State laws which might apply.

#### A. Statutes explicitly designed to cover Internet gaming.

1. Nevada -- SB 318 (codified at in NRS 465.091 to 465.094), signed into law on July 17, 1997 by Gov. Bob Miller, makes Nevada the first state to explicitly prohibit -- and allow -- gambling via the Internet.
  - a. An Internet operator, anywhere in the world, who accepts a wager from a person who is physically present in Nevada commits a misdemeanor and "may be prosecuted within this state." There is no exception for licensed out-of-state operators.
  - b. Anyone who makes a bet from Nevada via the Internet is committing a misdemeanor, regardless of where the person accepting the wager may be. Even before Prohibition, there have been few attempts to go after common bettors. This is the first, and so far only, law in this country which makes it a crime to make a bet on the Internet. Sen. Kyl's bill would make it a federal crime, as well.
  - c. Servers, like America Online, are also now covered, if they are aware gambling is taking place. It is a crime to "knowingly... send, transmit or relay" a wager from within Nevada to anywhere via the Internet, or from outside the state into Nevada via the Internet.
  - d. Exceptions: Because this is Nevada, it should come as no surprise that the new criminal penalties do not apply to wagers accepted in the state by:
    1. Nevada-licensed race and sports books;
    2. Nevada-licensed off-track pari-mutuel betting operators; and
    3. "Any other person or establishment that is licensed to engage in wagering" in Nevada; meaning casinos. Notice it is a crime for a Nevada resident to make an out of state bet, but perfectly legal for Nevada operators to accept wagers from anywhere in the world.

2. Louisiana -- LSA-R.S. 14:90.3, enacted July 15, 1997.

- a. Makes gambling by computer a misdemeanor. Defined as "conducting as a business of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit" over the Internet; bettors not covered.
- b. Makes it a felony, up to five years hard labor and \$20,000 fine, to design, develop, provide etc. any computer services or any server providing a web site "or any other product accessing the Internet... offering to any client for the primary purpose of the conducting as a business" any gambling.
- c. Statute exempts providers of online access, web sites, etc. if done "in the normal course of their business," unless "its primary purpose in providing such service is to conduct gambling as a business."
- d. Statute does not explicitly give state jurisdiction over out-of-state offenders.

3. Bills under consideration:

- a. Arizona -- HB 2367 (Introduced 1997).
- b. California -- SB 777 (1997) would have outlawed all Internet betting; while SB 141 (1997) would have permitted racing associations to accept out-of-state wagers by phone or any other approved communications technology.
- c. Hawaii -- House Concurrent Resolution No. 150 (1997).
- d. Illinois HB 793 (2/10/99), SB 4 (1/14/99), HB 1484 (1/19/99).
- e. Indiana HB 1484 (1/19/99); HB 1134 (1/6/99).
- f. New York -- SB 917 (1/1/2/99), SB 2044 (2/2/99); SB 4174 (1997) and AB 8044 (1997) would have required foreign companies to register with the Secretary of State; AB 7818 (1997) would have required posting bonds.
- g. Pennsylvania -- HB 2271 (2/24/98).

B. Statutes that have been construed as covering Internet gaming.

1. Minnesota -- see discussion under Personal Jurisdiction. First attorney general to post notice on Internet -- legal theory appears to be that an Internet gaming operator aids and abets the crime of making a bet in Minnesota. This will not work, because the state legislature has differentiated between individuals making a bet and those accepting a bet. If a gaming operation is guilty of aiding and abetting making a bet, then a drug buyer is guilty of aiding and abetting selling drugs.
2. Missouri -- Attorney General Jay Nixon has been one of the most active governmental officials in pursuing civil and criminal actions against Internet gambling operators.
  - a. In State v. Interactive Gaming & Communications Corp., CV97-7808 (Cir.Ct. Jackson County, Mo. May 22, 1997), Nixon obtained a permanent injunction against defendant and its subsidiary, Global Casino, Ltd.
    1. Defendant was served in its headquarters in Blue Bell, PA, but

- refused to answer or appear.
2. Undercover agents send a money order for \$100 to defendant's address in Pennsylvania.
3. Defendant agreed not to accept any applications from Missouri residents for casino gambling services, but did.
4. The court in Missouri held there was personal jurisdiction.
5. Defendant was enjoined from marketing in Missouri, from representing that its services were legal in that state; from accepting applications from residents of Missouri and was ordered to post notices. Defendant was also fined and ordered to pay costs.
- b. Interactive Gaming Corp. and its President, Michael Simone, continued to take wagers from Missouri -- pleaded guilty.
  1. Nixon obtained a criminal indictment that Simone had "traveled to" Missouri and "set up" a "gambling device" (the undercover agent's PC), which contacted defendant's Pennsylvania web site.
  2. Nixon obtained an extradition order from a trial court in Pennsylvania, upheld on appeal.
- c. Nixon was almost as successful against the Coeur d'Alene Indian Tribe's US Lottery; see discussion infra.
3. Florida -- Attorney General Butterworth ordered Western Union to cease wiring players' money to off-shore sports books. Butterworth had previously issued an Opinion that state law prohibits individuals within the state from placing a bet by wire. Fla.AGO 95-70 (Oct. 18, 1995).
4. Indiana -- In the Attorney General's opinion, "A Hoosier gambling on the Internet by sitting at her computer, feet firmly planted on Indiana soil, with credit-card number close at hand, is 'gambling' unlawfully in Indiana; for that Hoosier to gamble over the Internet from her home, office, or favorite tavern is not different in practical or legal terms from gambling by telephone, even if the person or computer taking the bet is at some exotic location; consequently, the individual making a bet and the person taking the bet are both lawbreakers." 1998 Op.Atty.Gen. 98-8. Indiana Attorney General Jeff Modisett sent emails to several dozen gambling-related websites asking administrators to inform visitors accessing the Net from Indiana that they are breaking the law. [www.rgtonline.com/index.cfm?BodyLoc=/newspage/artlisting.cfm/2494](http://www.rgtonline.com/index.cfm?BodyLoc=/newspage/artlisting.cfm/2494).
5. California -- Attorney General Dan Lungren, held Penal Code §§330 & 337a prohibits making a bet by phone from within the state to a licensed foreign sports book. 80 Ops.Cal.Atty.Gen. 98 (April 25, 1997). These statutes do make it criminal to place as well as take wagers; however, §330 covers only casino banking and percentage games and §337a only sports contest and races. Internet lotteries and bingo would not be covered; nor would Internet casinos, if computerized craps is legally a lottery rather than a banking or percentage game.
6. Texas AG Op. -- Dan Morales opined that the federal Wire Act would apply

not only to sports betting, but also to card games on the Internet.  
Tex.A.G.Op. No. DM-344 (1995).

7. Kansas -- Kan.Atty.Gen.Op. No. 96-31 (March 25, 1996) -- Anyone placing a bet on an Internet virtual casino using a computer in the state may be prosecuted in Kansas.
  8. Wisconsin -- See personal jurisdiction, *supra*.
- C. States allowing telephone, and sometimes computer, off-track betting. New York and Nevada are the only states with statutes which expressly allow out-of-state phone wagers. In other states, legislative silence is taken as permission. Pennsylvania is the only state, at present, accepting computer wagers from bettors located in other states.
1. Pennsylvania -- The Commonwealth's Legislature authorized telephone betting. 4 Pa. Stat. §325.218(b). Racing regulators decided this means OTBs may accept wagers by computer, under the theory that computers use telephone lines. Regulators also feel the federal Wire Act simply does not apply, so bets are accepted from anywhere in the world.
  2. New York -- NY Rac.Pari-M. §1012. The New York Racing Association announced in 1997 that it would be accepting wagers by computer; New York Senate's Committee on Gaming and Wagering held public hearings on March 12 and March 20, 1997, on the issue of whether New York's off-track betting corporations should be prohibited from offering online wagering services.
  3. Nevada -- Gaming Control Act §464.020 ¶3(b) restricted pari-mutuel wagering to places where the race or sporting event is taking place and to licensed race and sports books; while regulations have allowed intrastate telephone wagers for at least ten years. Regs. 22.140. In 1995 the Nevada Legislature passed SB 401, amending the Act to allow "wagers made by wire communication from patrons within the State of Nevada or from states in which such wagering is legal." However, no regulations have as yet been promulgated.
  4. Oregon -- In 1997 the Legislature authorized "account wagering," in which players deposit money in advance and then bet "in person, by direct telephone call or by communication through other electronic media." O.R.S. §462.142. Regulations have not yet been promulgated, but will probably allow out-of-state bettors.
  5. Connecticut -- In 1993 the state sold its off-track betting system to Autotote, a publicly traded corporation. Regulations prohibiting out-of-state telephone wagers were deleted. In December 1995 Autotote suspended accepting bets from 28 states, fearing that it might be violating state (not federal) laws.
  6. Kentucky -- Ky. Rev. Stat. §230.379. Ellis Park is accepting telephone wagers from throughout the nation. The Kentucky Racing Commission conducted tests of "in-home access:" televisions with a box for the fan to swipe his credit card before making bets.
  7. Maryland -- Md Code, Bus. Reg., tit. 11 §11-805. Statute allows telephone

wagers, but governor refuses to allow regulations to be promulgated.

8. Ohio -- Beulah Park had been taking interstate phone bets. The racing board abolished its enabling regulation after the Attorney General ruled telephone wagering illegal, 1995 Ohio Op. Atty. Gen. No. 95-034 (Oct. 10, 1995). Legislation is pending.
- D. States have considered other forms of at-home wagering -- intrastate only, so far.
1. At least three state lotteries tried telephone games: California, Indiana and Massachusetts. Second-chance games let players with losing paper lottery tickets enter by calling 800- or 900-numbers. The games had consideration, because players could bet more, by dialing the 900-number, for the chance of winning more.
  2. The most interesting U.S. experiment never got off the ground. In 1991, the Minnesota State Lottery announced that it would conduct a market test of at-home lottery games played on Nintendo video sets. The governor warned the Lottery that if it did, he would cut its marketing budget to zero.
- IV. Problems for law enforcement and civil plaintiffs when the operator is physically within the U.S.
- A. Although the Internet is not without precedent, the law is having trouble deciding upon the appropriate analogy: is it more like direct mail or television?
    1. Although the Internet is interactive, like mail or telephone, websites are passive and the user has to choose to receive the message, like television or radio, and similarly there is no way of stopping it at the border.
    2. The law is able to adapt to major technological developments. For example, a more revolutionary idea was the telegraph. For the first time Americans could be in easy and instantaneous communication with individuals in other states and countries. Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1 (Mem), 6 Otto 1, 24 L.Ed. 708 (1877).
  - B. Where does the act take place?
    1. Criminal law:
      - a. Substantive -- Sports book licensed in Jamaica and the Dominican Republic which took telephone wagers from the U.S. held did not accept bets in Texas under state anti-bookmaking law. Title 10, Texas Penal Code, Chapter 47 defines bookmaking as "to receive and record or to forward a bet." United States v. Truesdale, 152 F.3d 443 (5th Cir. 1998), convictions for illegal gambling in violation of the OCCA (18 U.S.C. §1955) and companion counts, conspiracy (18 U.S.C. §371) and money laundering (18 U.S.C. §1956), overturned.
      - b. Jurisdiction -- In Lamar v. United States, 240 U.S. 60 (1916), defendant was charged with impersonating a member of Congress with intent to defraud; held: the federal court in New York had jurisdiction because defendant's impersonation was by phone to a person in New York, so the crime took effect there.
      - c. Venue -- Criminal venue statutes for interstate crimes.
    2. Contract law -- A wager is a contract that is not completed until accepted.
    3. Indian law -- The Indian Gaming Regulatory Act ("IGRA") allows tribes to

run lotteries, but only if gaming "takes place" on Indian land. 25 U.S.C. §§2702(3) and 2710(d); the Coeur d'Alene tribe's "US Lottery" is testing whether gaming on the Internet is on Indian land.

- a. Under provisions of the Wire Act, 18 state attorneys general told AT&T and other telephone companies to cut off service. The Tribe sued the phone companies in its tribal court and won. On December 17, 1998, the federal district court reversed, holding the lottery was a gaming activity not on tribal lands. AT&T v. Coeur d'Alene Tribe, CIV 97-392-N-EJL (D.ID. 1998).
- b. Similarly, the Attorney General of Missouri sued the tribe, its operator and tribal officials in state court; the tribe removed. On January 6, 1999, the 8th Circuit reversed a trial court ruling that there was federal subject matter jurisdiction: If the state court decides the gaming was not on Indian land, the federal IGRA would not preempt state anti-gambling laws. State ex rel. Nixon v. Coeur D'Alene Tribe, --- F.3d ---, 1999 WL 2641 (8th Cir. 1999).

### C. Personal Jurisdiction.

1. State v. Granite Gate Resorts, Inc., 1998 WL 240133 (Minn. May 14, 1998), affirming 568 N.W.2d 715 (Ct.App.Minn. Sept. 5, 1997). In a 3-to-3, one sentence order, the Minnesota Supreme Court became the first state high court to confirm personal jurisdiction over an out-of-state Internet gambling operator. But, the case is a weak precedent, in part, because it is so strong procedurally (though not substantively). International Shoe Co. v. Washington, 326 U.S. 310 (1945), requires that the defendant have "minimum contacts" so the suit "does not offend traditional notions of fair play and substantial justice." Hanson v. Denckla, 357 U.S. 235 (1958), requires the defendant "purposely avails itself of the privilege of conducting activities within the forum state..."
  - a. Plaintiff, the state itself through its Attorney General, Hubert H. ("Skip") Humphrey, III, filed a civil, not criminal, complaint. The causes of action: deceptive trade practices, false advertising and consumer fraud, for advertising on the Internet that defendants' sports betting web-site, WagerNet, licensed in Belize, would be legal. Defendant Kerry Rogers, a resident of Nevada, moved to dismiss for lack of personal jurisdiction.
  - b. Minnesota's long-arm statute, Minn.Stat. §543.19, goes to the limits of due process under the federal constitution.
  - c. Quantity of contacts -- Defendant refused to cooperate with limited discovery and, as a sanction, the trial court ruled that at least one Minnesota resident was on WagerNet's mailing list. Minnesota computers contacted defendants' websites hundreds of times.
  - d. Quality of contacts -- Defendants advertised on the Internet to develop a mailing list and had a toll-free number. The Court of Appeals used as precedents Internet cases as well as T.V. and radio broadcasters, who knew their program would enter a state, and national direct mail

solicitations.

- e. Connection between cause of action and contacts -- Here the claims arise directly from defendant's contacts. Precedent: State v. Reader's Digest Ass'n., Inc., 81 Wash.2d 259, 501 P.2d 290 (1972) (mailing sweepstakes entry information constituted illegal lottery within state).
- f. State's interest -- The claims here are consumer protection and, most important, control of gambling.
- g. Convenience of parties -- The U.S. Supreme Court has never held it too inconvenient for a resident of one state to have to travel to another. Here, defendant weakened his case by reserving the right to sue customers where they live: if he can travel to Minnesota as a plaintiff, he can as a defendant.

- 2. Thompson v. Handa-Lopez, Inc., 998 F.Supp. 738 (W.D.Tex., March 25, 1998). Much stronger case: Held California Internet gaming operator can be sued for non-payment of Texas player in Texas.
- 3. Three law suits filed by Wisconsin A.G. James Doyle in September 1997: 1) UniStar Entertainment, developer games for the U.S. Lottery (pending in federal court); 2) Net Bet, Inc., and Torrey Pines Nevada, Inc., operators of Casinos of the South Pacific (pending in Dane County Circuit Court); 3) On-Line International, resolved: On-Line International ordered dissolved by United States District Judge John C. Shabaz in a consent decree that was entered upon agreement of the parties, "also barred the owners, officers, and employees of On-Line and its parent corporation, World Wide Web Casinos, Inc., headquartered in Santa Ana, California, from forming any new Wisconsin corporation for the purpose of operating an Internet gambling website." Internet Gaming International Newsletter, vol. 1, no. 5 at p. 1, 3 (May, 1998).

D. Indian tribal sovereignty -- A more difficult barrier.

- 1. The U.S. Supreme Court recently ruled that tribes have greater sovereign immunity than countries, even than the United States itself. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (U.S. 1998).
- 2. Federally recognized tribes have sovereign immunity and cannot be sued without their consent; though, Ex parte Young, 209 U.S. 123 (1908), may allow injunctions against tribal officials.
- 3. Tribe's sovereign immunity does not normally extend to non-tribal, private operators; however, if impact on tribe's sovereignty is too great, third parties may be protected.

V. Problems for law enforcement and civil plaintiffs when the operator is outside the U.S., besides all issues raise in IV above.

A. How foreign countries are handling Internet gambling --

- 1. Government operating the games themselves.
  - a. Liechtenstein -- Accepting bets from anywhere in the world, with the significant exception of the two relatively powerful countries that completely surround it: Austria and Switzerland.

- b. Finland -- The Lottery, Oy Veikkaus, has restrictions (instructions in Finnish, local bank account required) which effectively limit play to citizens within the country.
  - c. Bill to allow federal government of Canada to run Internet lottery passed first reading in Parliament, but then killed. Major issue would be provinces' exclusive control over all gambling; the federal government sold gambling to the provinces to fund the Calgary Olympics.
2. Governments selling licenses to some operators and ignoring the rest, no enforcement actions against licensees, nor against non-licensed local or foreign operators. Island and Latin American nations.
  3. Governments operating true licensing systems, with background checks, and penalizing non-licensed operators. Australian states and territories are in the forefront; their thinking is that Internet gambling is unstoppable, so government has a duty to regulate it to protect consumers.
    - a. Governments have issued licenses under existing laws, e.g. the Australian Capitol Territory using its Bookmakers Act of 1985.
    - b. The Gaming and Racing Ministers of all Australian states and territories met on May 3, 1996, and agreed on a set of principles, leading to a draft National Regulatory Model for new forms of interactive home gambling products. Existing at-home betting, such as telephone betting with TABs and bookmakers, were excluded.
    - c. The draft Model, first passed by the Queensland Parliament on March 18, 1998 as the "Queensland Interactive Gambling (Player Protection) Act" went into effect on October 1, 1998. The Australian Capitol Territory and Tasmania also adopted laws to license Internet gaming sites, though Tasmania added a prohibition against Tasmanians betting on its sites. The laws:
      1. Expressly legalize Internet gaming operations that have been licensed by a state or territory.
      2. Expressly declare all other Internet gaming products illegal and prohibited from advertising.
      3. Set uniform national standards comparable to the regulation of casinos; though each jurisdiction decides how many operators it will license.
      4. Internet gambling is taxed, with the money going to the state or territory where the player resides. For American and other non-Australian players, tax money is retained by the jurisdiction in which the service provider is located.
    - d. Licensing of new operators and allowing them to take wagers from within that jurisdiction creates conflicts with existing gaming operators in a state or territory, who thought they had the exclusive right to accept bets.
  4. Governments specifically prohibiting Internet gambling, e.g. Louisiana.
- B. The law of Internet gambling is based on the law of gambling, not

communications law.

1. Communications law is concerned with the free commerce of ideas and protection of individuals' rights. See e.g. Reno v. American Civil Liberties Union, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (Portions of Telecommunications Act of 1996, 110 Stat. 56, designed to protect minors from "indecent" material on the Internet declared unconstitutional). The "marketplace of ideas" even gives protection to purely commercial speech: A gambling ad, but not the gambling itself is protected speech. Valley Broadcasting Co. v. United States, 107 F.3d 1328 (9th Cir. 1997).
  2. With gambling, commerce is usually completely prohibited. When commercial gambling is allowed, it is always severely restricted by statute and highly regulated by government. With legal gambling individuals have virtually no rights. As extreme examples: In re: Soto, 565 A.2d 1088, 236 N.J.Super. 303 (App. Div. 1988) (upholding state restriction on right of key casino employee to participate in political activity) and State of Nevada v. Rosenthal, 93 Nev. 36, 559 P.2d 830 (1977) ("We view gaming as a matter reserved to the states... Within this context we find no room for federally protected constitutional rights").
- C. Regulation and prohibition of gambling is based on the state's police power.
1. There may be few published appellate decisions on the legality of Internet gambling. But, the question of a government's ability, under its police power, to control the transmission of gambling information and wagers was resolved years ago. See, e.g. People v. Milano, Cal.App.3d 153, 152 Cal.Rptr. 318 (1979) and the cases cited therein. "Not only does the Legislature have the power to completely prohibit wagering on horse races, but it may also limit such wagering to persons physically present within the enclosure," Advanced Delivery Service, Inc. v. Gates, 183 Cal.App.3d 967, 228 Cal.Rptr. 557 (1986).
  2. The law of nations holds that every state has the right, perhaps even the obligation, to protect the health, safety and welfare of its citizens.
    - a. The police power is most commonly connected with governmental action taken in emergency situations, especially where public health is endangered, as in an epidemic.
    - b. But gambling, licensed or illegal, even legal lotteries, has always been held to fall within a state's police power.
  3. The police power has three interesting, and unusual, attributes:
    - a. A state's police power is virtually unlimited.
      1. When a state is faced with a threat to the health, safety and welfare of its citizens, particularly in an emergency, the police power prevails, trumping constitutional and other legal rights. At its most extreme, government can even take life without due process safeguards -- the police do not conduct evidentiary hearings before shooting a madman firing a rifle.
      2. Because gambling is treated as a police power issue, governments can act in ways that would be unthinkable in other

commercial and social settings. "The police power of the State to suppress gambling is practically unrestrained," Mills v. Agnew, 286 F.Supp. 107 (Md.1968).

- b. A state's police power is often tied to morality, and gambling is a morally suspect industry.
  1. Governments' response to the development of the Internet is typical of strong moral views driving public policy. On July 1, 1997, President Clinton and Vice President Gore issued "A Framework For Global Electronic Commerce." The document is a model of viewing the Internet as a problem in communications law.
    - a. Under "Content" it reads, "The U.S. government supports the broadest possible free flow of information across international borders. This includes most informational material now accessible and transmitted through the Internet..."
    - b. The report endorses the view that parents and private industry, through ratings systems, filtering devices and other technology, can take care of potential problems, such as children's access to pornography.
  2. But the first concrete Internet law supported by the Administration was a ban on Internet pornography. Free speech is all right in theory, but the urge to uphold society's moral norms is so great that the government's first response to the new technology was to assume the role of censor.
- c. A state's police power is a local issue. We are, after all, dealing with state police power. See, e.g., Winshare Club of Canada v. Dept. of Legal Affairs, 542 So.2d 974 (Fla. 1989) (upholding state's power to exclude foreign lottery tickets). Larger government organizations like federations almost never become involved, unless the threat to society is beyond the control of local government.
  1. During the formative stages of modern governments the protection of citizens' health and safety was best left to authorities on the scene. Given the technology existing then, and perhaps even today, the major threats of fire and disease were not controllable from distant national capitols.
  2. Morality also was and still is decided primarily at the local level. States tend to be small enough to appear homogeneous, or at least dominated by a single religion. In the American system states are encouraged to experiment. New Jersey's experiment with using large land-based casinos as a tool of urban redevelopment failed, but Iowa's refinement of the idea -- putting the casinos on river boats -- has been copied by half-a-dozen other states.

D. Police power as a requisite of state government cuts two ways.

1. It is well established under international law that a state's police power within its own borders is virtually absolute. And a state may exercise power over its own citizens while they are abroad, so long as there is no interference with the foreign country's sovereignty.
2. But states, even in the same federation, are not allowed to interfere in the internal affairs of other states. Governments are not supposed to impose their morality on citizens of another government residing in their home states.
3. The Schindler case, reaffirmed this police power for European states. Her Majesty's Customs and Excise v. Gerhart Schindler and Joerg Schindler, Reference for a Preliminary Ruling: High Court of Justice, Queen's Bench Division - United Kingdom, Court of Justice of the European Communities, Case C-275/92, Doc.Num. 692J0275, Reports of Cases 1994 I-1039 (Judgment Mar. 24, 1994).
  - a. The Court of Justice of the European Communities had to decide whether the United Kingdom could keep out advertisements and tickets of legal German lotteries.
  - b. The Court held that lotteries are "services" within the meaning of article 60 of the EEC Treaty. Article 59 prohibits a Member State from putting obstacles on cross-border services.
  - c. But, in a remarkable declaration of a state's power to control all forms of gambling within its borders, the Court declared that "given the peculiar nature of lotteries," the U.K. could restrict or even prohibit lotteries from other EEC Member States, provided those restrictions were not discriminatory.

#### E. Sovereignty.

1. Is it truly legal in the foreign licensing jurisdiction?
  - a. It is difficult to know if an Internet gambling operator, who claims to be licensed by a foreign government, is actually licensed. Operators have claimed to be licensed by the following governments: Antigua and Barbuda, Aruba (part of the Kingdom of the Netherlands), Belize, Cook Islands, Costa Rica, Curacao in the Netherland Antilles (part of the Kingdom of the Netherlands), Dominica, Dominican Republic, England in the United Kingdom, Gibraltar (dependent territory of the United Kingdom), Grand Turk in the Turks and Caicos (dependent territory of the United Kingdom), Grenada, Monaco, New South Wales in Australia, Northern Territory in Australia, the Solomon Islands, St. Kitts and Nevis, St. Vincent and the Grenadines, Trinidad and Tobago, and Venezuela.
  - b. If the operator is licensed, does the license allow accepting wagers over the Internet from Americans?
    1. The head of the biggest illegal telephone sports betting ring in history, Ron "The Cigar" Sacco, was arrested by police of the Dominican Republic for violating local gambling laws, because the Dominican Republic only allowed local betting, and Sacco

- was taking phone bets from the United States.
2. Sacco was then deported to the U.S. as an undesirable alien.
- c. Does the governmental body that issued the license have the authority?
    1. For example, do Gibraltar and the Turks and Caicos, both dependent territories of the United Kingdom, have the power to authorize gambling in contravention of laws of the U.K.?
    2. The Canadian Pari-Mutuel Agency's Executive Director, Elizabeth Massey, ruled that she lacked jurisdiction to allow a track to take bets online, because it would violate Canada's federal Criminal Code. A federal court in Toronto upheld her decision to deny an amendment to the Ontario Jockey Club's wagering permit. Association of Racing Commissioners International, Inc., "Canadian Court Denies Internet Application," 64 Bulletin No.3 at p.1 (Feb. 24, 1998).
2. Being legal in another jurisdiction is not necessarily protection.
    - a. The federal government can exercise jurisdiction over foreign national acting legally in their own country, if the statute is sufficiently explicit, and the detrimental effects from defendant's activities are felt in this country.
    - b. In United States v. Moncini, 882 F.2d 401 (9th Cir. 1989), defendant was convicted in the United States District Court for the Central District of California, of mailing child pornography from Italy, where such mailing was legal. Prosecutors argued two possible bases for jurisdiction over Moncini:
      1. Jurisdiction is proper if part of the offense occurred within the United States. See Rocha v. United States, 288 F.2d 545, 547 (9th Cir.1961).
      2. Jurisdiction is proper even if no part of the offense occurred in the United States, if grounds for exercising extraterritorial jurisdiction are present. *Id.* at 548.
      3. Here, the 9th Circuit held under the specific statutes involved, mailing of child pornography was a continuing offense, so that part of the offense was committed in the United States as the letters traveled through the mail and were delivered to their destination. The Court specifically rejected defendant's argument that the crime was complete at the time the letter was deposited in the mail in Italy.
    - c. Congress has power under the Commerce Clause and its police power to regulate or prohibit legal gambling that crosses state or national boundaries.
      1. The United State Supreme Court upheld a conviction under the Wagering Paraphernalia Act for carrying legal New Hampshire Sweepstakes acknowledgments across the state line into New York. United States v. Fabrizio, 385 U.S. 263 (1966). The

- federal anti-lottery laws apply to legal as well as illegal lotteries.
2. In Martin v. United States, 389 F.2d 895 (5th 1968), convictions were upheld on a business that took bets in Texas, telephoned partners in Nevada, and placed the bets with licensed Las Vegas sports books. The federal law here was designed to help enforce anti-gambling policies of states.
  3. Internet gambling operated by a foreign government is, in theory if not practice, also subject to U.S. federal and state laws. Liechtenstein operates an Internet lottery that solicits American customers.
    - a. Foreign governments are, in general, immune under the act of state doctrine. Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§1602-1611; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
    - b. But, "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case... in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. §§1605.
    - c. "As to any claim for relief with respect to which a foreign state is not entitled to immunity under §1605... the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages..."
    - d. "As the legislative history of the FSIA reveals, contracts for the purchase or sale of goods or services are presumptively 'commercial activities,'" Rush-Presbyterian-St. Luke's Medical Center v. The Hellenic Republic, a Foreign Country, 877 F.2d 574 (7th Cir. 1989).
  4. But there have to be limits. Can the government of France arrest U.S. operators for using English?
- F. Treaties -- Mutual Legal Assistance Treaties ("MLATs").
1. Comity, countries respecting the criminal law, in particular, of other countries, has been formalized in treaties.
  2. There are a number of MLATs requiring a country to exercise moderation and restraint before it attempts to unilaterally enforce its laws on foreign citizens in their home countries.
    - a. Under the MLAT between the U.S. and the U.K., S. Treaty Doc. No. 104-2, 1994 WL 855115, the American government would be required to enter into consultations with the government of England before U.S. officials could subpoena the bank records of a U.K. Internet gambling operator.
    - b. The MLAT calls for the offended government, in this case the U.S., to

try civil means, non-criminal enforcement, before taking criminal-like action, such as seizing assets.

- G. Right to due process, be present at trial and confront witnesses.
1. Civil suits -- due process, 5th and 14th Amendments; problems of personal jurisdiction.
  2. Criminal cases.
    - a. The law of nations holds that governments are almost never allowed to impose their criminal laws on foreign citizens in foreign States.
    - b. Even U.S. citizens may be safe, if they refuse to come voluntarily to the U.S. for trial: The U.S. does not allow true trials in absentia.
      1. Criminal defendants have the right to be present at trial.
        - a. Sixth Amendment constitutional right to confront witnesses.
        - b. Common law right to be present at trial, codified at F.R.Crim.P. 43.
        - c. However, right may be voluntarily waived, by actions of defendant. *Diaz v. United States*, 223 U.S. 442, 456-58 (1912); F.R.Crim.P. 43(b) (continued presence not required).
      2. Extradition is difficult; extradition treaties may cover criminal fraud, but there are no extradition treaties for illegal gambling, especially if it is licensed by the treaty partner and "illegal" only in the view of the U.S.
      3. Government sanctioned "kidnaping" is allowed only for heinous and major crimes. It takes an extraordinary situation for a country, like the United States, to invade another country -- say Panama -- to arrest a citizen of that country, Manuel Noriega, for violating American drug laws. *United States v. Noriega*, 746 F.Supp. 1506 (S.D. Fla. 1990) (seizure upheld).

### END OUTLINE

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END

## I. NELSON ROSE

Professor I. Nelson Rose is an internationally known public speaker, writer and scholar and is recognized as one of the world's leading authorities on gambling law. A 1979 graduate of Harvard Law School, he is a tenured full Professor of Law at Whittier Law School in Costa Mesa, California, where he teaches one of the first law school classes on gambling law.

Professor Rose is the author of more than 200 books, articles and chapters on the subject. He is best known for his internationally syndicated column, "*Gambling and the Law*®," and his landmark 1986 book by the same name. His most recent book -- just released -- is a collection of columns and analysis on Blackjack and the Law.

A consultant to governments and industry, Professor Rose has testified as an expert witness

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in administrative, civil and criminal cases and has acted as a consultant to major law firms, licensed casinos, international corporations, players, Indian tribes, and local, state and national governments, including California, Florida, New Jersey, Texas, Washington, and the federal government of Canada.

With the rising interest in gambling throughout the world, Professor Rose has been called upon to discuss gambling and the law before such diverse groups as the National Conference of State Legislatures, Congress of State Lotteries of Europe, National Academy of Sciences and the United States Conference of Mayors. He has presented scholarly papers on gambling in Nevada, New Jersey, Puerto Rico, England, Australia, Portugal, Argentina and the Czech Republic.

- HIT BACK ON YOUR BROWSER TO RETURN TO THE PREVIOUS PAGE

## America Boldly Outlaws (And Quietly Legalizes) Internet Gambling

Governments around the world are responding in different ways to the explosion of gambling on the Internet:

, Some jurisdictions are setting up strict regulatory systems, complete with licenses, background checks, controls and, of course, taxes. The Australian states and territories are setting the standards for the rest of the world.

, Other countries are not as picky. One publicly-held corporation told the U.S. Securities and Exchange Commission that it bought the right to issue licenses from the government of Grenada. An official from Grenada has reportedly denied this.

, Some countries are running the games themselves: Liechtenstein has a lottery open to almost any adult in the world with a modem. Although proclaiming this is legal, the small duchy had the political smarts to close its games to its much more powerful neighbors, Switzerland and Austria.

, Some jurisdictions are passing new laws explicitly prohibiting Internet gambling. Or so they say.

The federal and state governments of the United States are the best examples of how lawmakers can proclaim publicly that they are outlawing betting on the Internet, while they actually are taking steps to make it legal.

Nevada was the first state to both outlaw and legalize Internet gaming.

In July 1997 Gov. Bob Miller signed SB 318, creating the misdemeanor of making or accepting a bet over the Internet from a player located in Nevada. SB 318 is a significant step toward the regulation of the Internet, because it is the first statute to explicitly make Internet gambling a crime in a state, even if the operator is not within that state=s territory.

But SB 318 is also important for the exceptions it carves out of its new

prohibitions. Making and accepting bets on the Internet are legal, if the wagers are accepted in Nevada by Nevada-licensed race and sports books and casinos.

Nevada companies are gearing up to accept bets by computers. But the State Gaming Control Board is limiting operators to closed-loop systems: players can bet from their home personal computers (APCs@), but their modems will be connecting the players= PCs directly to the operators= computers. Bettors cannot use this system to jump to a site on the Internet.

The Board has not issued regulations allowing true Internet gaming. In fact, it is requiring that the bettor be in Nevada and that the closed-loop system be able to confirm that no bets are taken from outside the state.

Nevada is ready to go, to allow its licensees to take bets on the Internet, as soon as Congress lifts the federal restrictions on interstate wagers.

Louisiana and Illinois were the next states to act. Although the Louisiana law is poorly written, they both appear to prohibit all gambling on the Internet.

The most recent state to act, Michigan, is following Nevada in a big way. In December 1999 Gov. John Engler signed SB 562 into law. SB 562 looks like it is merely extending parts of the state=s criminal law to the Internet: Computers cannot be used for stalking, making bomb threats or gambling.

But a careful reading finds that only forms of gambling that are already illegal are barred from the Internet. Michigan law now clearly allows its state lottery, racetracks, casinos and bingo halls to accept bets online.

The most interesting proposal is the Kyl bill, now working its way through the political maze in Congress. Three years ago, the AInternet Gambling Prohibition Act,@ authored by Sen. Jon Kyl (R.-Az), would have outlawed everything, including online magazines and casino advertisements.

It=s major weakness, besides violating the First Amendment, was that it would also have made it a federal crime to merely place a bet. The U.S. Department of Justice, which does not have fond memories of Prohibition, made it clear that it did not support a law that would require knocking on bedroom doors to go after \$5 bettors. So the Kyl bill had to be amended.

As this is being written, a much revised Kyl bill has passed the Senate and is pending in the House. In its present form, it outlaws all Internet gambling ... except:

- , Securities and commodities, as if day-trading was not gambling;
- , Closed-loop systems for placing bets on horse and dog races,

including from a home PC in one state to an Off Track Betting operator in another.

, Parimutuel pooling of bets between tracks.

, State lotteries, including multi-state lotteries, so long as the betting PC is in a facility open to the general public.

, Some forms of Indian gaming.

, Bets made for a fantasy sports league game or contest.

Politicians may talk Prohibition, but the future clearly is partial legalization.

[Professor Rose can be reached at his Web Site:  
[www.GamblingAndTheLaw.com](http://www.GamblingAndTheLaw.com)]

END

## Where Are You, Internet? Here!

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### Asserting Jurisdiction Over Online Gambling Site

By: Chuck Humphrey  
[Update on Nov. 19, 2004]

#### Introduction

A former law partner of mine[1] once told me that he could figure out answers to legal questions based on knowing where each player in the problem was. He reasoned that everybody had to be some place. Then he determined where that place was. Once he put everybody in place, he had a map showing him where everyone was in relation to each other. From the map he could assume, guess or argue their responsibilities and obligations to one another.

This article focuses on the power of U.S. courts to assert personal jurisdiction over website operators. This article does not deal with the more practical, and probably more important, questions of:

- How does a law enforcement authority enforce a sentence issued by a state court?
- How can a private person collect on a money judgment against an operator located out of the United States?
- Is it wise to try to enforce gambling laws on an extraterritorial basis?

Those questions will be the subjects of future articles.

#### The Question

Where is the legal here for an Internet gambling website?

The proper answer to that question determines the ability of the "Court of Here" to assert legal jurisdiction over the possibly offending website operator and perhaps also over some of its owners, operators, employees, other affiliates and advisors.

"Jurisdiction" means having the authorized legal power to determine issues raised in a criminal indictment or information or in a civil complaint presented to the court by a law enforcement authority or a private person. The defendant has to be haled into the state court by a legal method of giving notice and the state court has to also have the power to determine the subject matter involved in the dispute.

The typical legal method of giving notice to an absent defendant (whether out-of-state or out-of-country) involves using the so-called long-arm laws that have been adopted by every state[2]. This kind of statute allows a substituted method of giving notice (i.e. service of process), such as mailing the notice. One court went so far as to authorize notice by sending a mere email to the absent defendant at his website[3].

In analyzing the application of the law we will use hypothetical situations confronting Hypo Online Gambling. com. The facts about Hypo are in a separate article on this website, Who is Hypo Online Gambling.com?

#### Where in the world is Hypo?

Operators of websites that offer real-money wagering, like Hypo, take the position that here is the place where they are incorporated (Costa Rica), or where the server for their website is located (Canada), or where they may have gotten a license to engage in casino-style gambling (Canada, Costa Rica or both) or only in cyberspace. (An analysis of some of the foreign licensing procedures is in a separate article on this website, Licensing of Online Casinos.)

Cyberspace is everywhere all at once, they thus conclude that the website has no particular here—so the website is everywhere. They thus violate the wry, immutable truth of the universe that no matter where you are, you are always here.

No less a legal expert than Anthony Cabot of the prominent Las Vegas firm Lionel Sawyer & Collins recently took exactly that position in an interview on the Nov-Dec 2004 PokerUpdates.com show available on streaming video. He said, "The Internet has no location. It is in cyberspace." That will come as an insupportable shock to many state and federal courts that have successfully asserted jurisdiction in the places where an interactive website is received by a user.

Following the lead of attorney Cabot, the owners and operators of online gambling websites firmly believe and insist that wherever they in fact are, it is nowhere near any place that might want to punish them for violating the gambling and gaming laws of that place.

In asserting personal jurisdiction over out-of-state or out-of-country companies, Professor Michael Geist notes that there are three layers:

- An "application layer."
- A "substantive layer," and
- An "enforcement layer." [4]

The rest of this article covers the application and substantive layers. The enforcement layer is not dealt with even though it is perhaps the most problematic layer. [5]

The application layer deals with gaining personal jurisdiction over a defendant in the International Shoe sense. That is, whether Hypo should expect to be haled into the Court of Here and what means will give Hypo fair notice that it is being haled in.

The substantive layer deals with whose law can or should be applied in deciding the litigation. That is, whether the law of the state in which the Court of Here is located should be applied to Hypo's gambling offerings, or whether the laws of either Costa Rica or Canada should be exclusively applied.

The enforcement layer deals with how the plaintiff in the litigation can extract from Hypo any penalties that the Court of Here may order.

### **Zippo and Hypo: Personal Jurisdiction**

The U.S. law on asserting personal jurisdiction over an absent Internet website has evolved from the decision in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa.1997). The court there announced the following test:

"[T]he likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. . . . At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end . . . is a defendant [who] has simply posted information on an Internet Web site which is accessible to [forum resident] users . . . . The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer." *Zippo*, 952 F. Supp. at 1124 (citations omitted).

The evolution of this test is considered and applied in *Gator.com Corp. v. L.L. Bean, Inc.* (9th Cir. No. 02-15035). *Gator.com Corp.* distributes a "digital wallet" software product that allows users to store passwords to various websites. When a user of that software logged into the online website of sports clothing and equipment retailer L.L. Bean, Inc., an embedded ad for an L. L. Bean competitor would pop up on the computer screen. Bean mailed a nastygram to Gator telling it to stop interfering with its website. Gator filed a lawsuit in a California Federal District Court seeking a declaratory judgment approving its actions. The Ninth Circuit Court of Appeals upheld the assertion of personal jurisdiction, finding "that there is general [personal] jurisdiction in light of L.L. Bean's extensive marketing and sales in California, its extensive contacts with California vendors, and the fact that, as alleged by Gator, its website is clearly and deliberately structured to operate as a sophisticated virtual store in California." *Id.* at 12671. (Page reference is to the source linked in the case title above) 6% of L.L. Bean's business was from sales into California. The Ninth Circuit said:

"In addition,...Gator alleges that L.L. Bean 'targets' its electronic advertising at California and maintains a highly interactive, as opposed to 'passive,' website from which very large numbers of California consumers regularly make purchases and interact with L.L. Bean sales representatives...L.L. Bean has not merely made a single 'package' purchase from a [California] vendor or cashed a check on a [California] bank; instead, it ships very large numbers of products to California and maintains ongoing contacts with numerous California vendors. Nor are any of L.L. Bean's contacts occasional or infrequent....L.L. Bean's contacts are part of a consistent, ongoing, and sophisticated sales effort that has included California for a number of years." *Id.*

The Court also said: "even if the only contacts L.L. Bean had with California were through its virtual store, a finding of general jurisdiction in the instant case would be consistent with the "sliding scale" test that both our own and other circuits have applied to internet-based companies. *Id.* at 12673. NOTE: On April 29, 2004, in No. 02-15035, the 9th Circuit ordered the decision of the three-judge panel stayed pending an *en banc* hearing, which may well change certain aspects of or overturn entirely this decision.

Personal jurisdiction was found **lacking** in *Pound v. Airosol, Inc.* No. 02-2632-CM, recently decided in a Federal District Court in Kansas. The court there found that the sellers of the products involved had only minimally interactive websites (e.g. they did not offer an online shopping cart through which any of the products could be ordered and paid for), limited contacts with residents of Kansas, and that there was no evidence any of the defendants targeted Kansas resident or that any of defendants products had ever in fact been sold to a Kansas resident.

### How do Hypo's activities measure up to these extended Zippo standards?

It targets residents of various U.S. states by:

- sending emails advertising its activities,
- offering bonuses and incentives to players, and
- advertising on the cable TV show.

Its website is very interactive. That is the nature of online gambling.

It has an important ongoing relationship with the U.S.-based vendor of its operating system.

It deposits money it receives from residents of various states, albeit the deposits are made in its foreign bank account.

More than half its business comes from residents of the U.S.

### Yahoo and Hypo: Substantive Jurisdiction

Once the Court of Here has decided to exercise personal jurisdiction over a defendant, it usually follows that the court will also apply the substantive law of its state. A series of decisions involving the civil and criminal laws of France, the United States, California and Missouri is instructive of the application of local laws and the thought and analysis the court with personal jurisdiction gives to whether it is proper to apply those local laws to an absent defendant.

Under French law it is a crime to offer or promote the sale of Nazi objects. A French court applied that substantive French law and ordered Yahoo to ban online auctions by its users of Nazi memorabilia.[6] Yahoo turned around and sued the French plaintiffs in a U.S. Federal District Court in Northern California. The District Court there held it was fair to compel the plaintiffs in the French litigation to litigate in the U.S. and that it could apply substantive U.S. freedom of speech law to allow Yahoo to allow it to continue hosting the auctions offering of the Nazi items on its website. During August 2004, a three-judge panel of the 9th Circuit Court of Appeals reversed, holding that there was no personal jurisdiction over the French entities. (Yahoo wound up adopting a policy banning the auction of such objectionable items, anyway, a ban which remains in its auction guidelines today.)

Subsequently, "A court in Paris dismissed criminal charges that were [also] brought against Yahoo!, Inc. and its former CEO, Tim Koogle, in a criminal prosecution involving the auction of [the] Nazi memorabilia on Yahoo's auction site. The case was closely watched around the world because it appeared to open up Internet providers to prosecution anywhere in the world even if their activities were legal in their home countries. ...[A] French criminal court dismissed all charges, holding that Yahoo never tried to 'justify war crimes [or] crimes against humanity.' Although this decision does not

address the important jurisdictional issues raised by France's actions, it does support free expression online by protecting a better understanding of the appropriate role of providers and hosters of material." [7] Note: This appears to be a decision that applies the substantive French criminal law and determines it was not violated by Yahoo or its CEO.

In *Twentieth Century Fox Film Corp. v. iCraveTV*, No. 00-121, 2000 U.S. Dist. LEXIS 1013, at \*2 (W.D. Pa. Jan. 28, 2000) a U.S. District Court applied U.S. substantive law and ordered a Canadian company webcasting in Canada, to prevent distribution of its webcasts to those in United States jurisdictions. iCraveTV, whose webcasting of some U.S. TV shows was legal under Canadian law, had taken substantial measures to prevent U.S. residents from using its webcasts. It required three separate verifications from a user before allowing a subscription. These "clickwrap" agreements were an attempt to limit access to Canadian residents. A potential user trying to sign up for the service had to first enter his or her local area code. If it was an out-of-Canada area code, access was prohibited. The second step required the user to confirm that he was located in Canada. The user had to click on one of two choices: "In Canada" or "Not in Canada." Again, access was denied if the "Not in Canada" choice was checked. Finally, the potential user was required to agree to accept or reject by scrolling to the bottom of a clickwrap agreement with the complete terms of use, which contained a confirmation that the user was located in Canada.

*Missouri v. Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir.1999), involved the state of Missouri's challenge to the legality of the offering of a nationwide lottery by an American-Indian lottery over the Internet. The Eighth Circuit remanded this case back to the original federal District Court to determine where the gambling involved took place, i.e. if the gambling was "on Indian lands." The Eighth Circuit implied that its view was that the gambling occurred in the place where the person making the wager on the lottery was located at the time of the bet. The suit was ultimately transferred from the Federal District court to a Missouri state court, thus implicitly confirming the view that the gambling took place where the person making the bet was at the time of the bet, Missouri, and not on the Indian lands occupied by the Coeur D'Alene Tribe in Idaho.

### How do Hypo's activities compare to the standards considered in these Yahoo cases?

- Even if its actions are perfectly legal under applicable Canadian or Costa Rican law, its promotes gambling by U.S. residents.
- For real-money bets on its website Hypo earns revenue, thus violating state gambling laws, all of which criminalize this sort of activity taking place in the state, whether it constitutes professional gambling or a violation of the gaming licensing laws of the particular state.
- Hypo's targeting of people in the United States subjects it to the assertion of personal jurisdiction by particular state courts.
- Its activities are open and obvious given the public nature of its business, so its defenses to criminal and civil charges of promoting gambling are limited.
- It does not take any action to attempt to block U.S. residents from accessing its website.

### End notes:

[1] William D. Hoops, who was the senior partner of Hoops & Levy, Houston Texas, until his untimely passing in 2004.

[2] The basic United States law on asserting jurisdiction over out-of-state defendants was stated in the Supreme Court's landmark *International Shoe* case. The Supreme Court held that the Constitution's due process clause permits a state court to assert personal jurisdiction over an absent out-of-state defendant provided that the defendant has "minimum contacts" with the state so that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *International Shoe v. Washington*, 326 U.S. 310 (1945)

[3] *Rio Properties, Inc v. Rio International Interlink*, 284 F.3d 1007 (9th Cir. 2002). [Page references below are to the linked pdf file accessible by clicking on the case title.]

The Rio Hotel and Casino in Las Vegas sued an online sports betting website, Rio International Interlink (RII) In this opinion the U.S. Ninth Circuit Court of Appeals said: "Unable to serve RII by conventional means, RIO filed an emergency motion for alternate service of process. RII opted not to respond to RIO's motion. The district court granted RIO's motion, and pursuant to Federal Rules of Civil Procedure 4(h)(2) and 4(f)(3), ordered service of process on RII through the mail... and via RII's email address, email@betrio.com. [Id at 4470.] ...

"Even if facially permitted by Rule 4(f)(3), a method of service of process must also comport with constitutional notions of due process. To meet this requirement, the method of service crafted by the district court must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (Jackson, J.).

"Without hesitation, we conclude that each alternative method of service of process ordered by the district court was constitutionally acceptable. In our view, each method of service was reasonably calculated, under these circumstances, to apprise RII of the pendency of the action and afford it an opportunity to respond. [Id at 4476-7.] ...

Finally, we turn to the district court's order authorizing service of process on RII by email at email@betrio.com. We acknowledge that we tread upon uncharted ground. The parties cite no authority condoning service of process over the Internet or via email, and our own investigation has unearthed no decisions by the United States Courts of Appeals dealing with service of process by email and only one case anywhere in the federal courts.

In light of this dearth of authority, however, we do not labor long in reaching our decision. Considering the facts presented by this case, we conclude not only that service of process by email was proper – that is, reasonably calculated to apprise RII of the pendency of the action and afford it an

opportunity to respond – but in this case, it was the method of service most likely to reach RII.” [Id at 4477-8.]

[4] Is There a There There? Toward Greater Certainty for Internet Jurisdiction by Michael Geist, 16 Berkley Technology Law Journal (2001). Here is an excerpt from the abstract in the article: “The unique challenge presented by the Internet is that compliance with local laws [meaning the laws of the state of incorporation and/or the place where the Internet access server is located] is rarely sufficient to assure a business that it has limited its exposure to legal risk. Since websites are accessible worldwide, the prospect that a website owner might be haled into a courtroom in a far-off jurisdiction is much more than a mere academic exercise, it is a very real possibility. The article identifies why the challenge of adequately accounting for the legal risk arising from Internet jurisdiction has been aggravated in recent years by the adoption of the Zippo legal framework, commonly referred to as the passive versus active test... The solution submitted in the article is to move toward a targeting-based analysis. Unlike the Zippo approach, a targeting analysis would seek to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction. Targeting would also lessen the reliance on an effects analysis, the source of considerable uncertainty since Internet-based activity can ordinarily be said to create some effects in most jurisdictions.”

[5] In a footnote Professor Geist says: “Despite this article’s focus on the application layer—better known as adjudicatory jurisdiction—some commentators have opined that the enforcement layer actually presents the greatest challenge in the online environment. See, e.g., Henry H. Perritt, Jr., Will the Judgment-Proof Own Cyberspace?, 32 INT’L LAW. 1121, 1123 (1998) (“The real problem is turning a judgment supported by jurisdiction into meaningful economic relief. The problem is not the adaptability of International Shoe—obtaining jurisdiction in a theoretical sense. The problem is obtaining meaningful relief.”).” Professor comments: “Since the Yahoo.com site was not intended for a French audience, and users implicitly agreed that United States law would be binding, the company felt confident that a French judge could not credibly assert jurisdiction over the site. [Footnote omitted.] Judge Jean-Jacques Gomez of the County Court of Paris disagreed, ruling that the court could assert jurisdiction over the dispute since the content found on the Yahoo.com site was available to French residents and was unlawful under French law. [Footnote omitted.]

[6] “We order the company YAHOO! Inc. to take all measures to dissuade and make impossible any access via Yahoo.com to the auction service for Nazi objects and to any other site or service that may be construed as constituting an apology for Nazism or contesting the reality of Nazi crimes....” Yahoo!, Inc. v. LICRA, C-00-21275 JF, 2001 U.S. Dist. Lexis 18378, at \*6, 7 (N.D. Cal. Nov. 7, 2001) (citing the French court’s decision in UEJF et LICRA v. Yahoo! Inc. et Yahoo France). An analysis of this French case by Yaman Akdeniz, a faculty member at the University of Leeds, is available online.

[7] Reported on the Center for Democracy & Technology website. I do not have access to the text the actual French decision. Thus, I rely on the accuracy of the report to which I have linked.

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**Chuck Humphrey is available to help answer questions and analyze and structure transactions.**

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# California Online Poker Legal?

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## Is Playing Poker Online in California Legal

By: **Chuck Humphrey**

Professor I. Nelson Rose [1] recently wrote a short article entitled "Is It A Crime to Play Online?" His article is intended to look at this question only from the standpoint of the player, not from the standpoint of the operator of an online gambling website [2]. He says: "All states make it a crime to *conduct* some forms of unauthorized gambling. But about half the states also make it a crime to *make a bet* under some circumstances, even though nobody is ever charged any more." (Emphasis supplied.)

The author says: "California, for example, makes it a crime to play 11 named games, including '21' and any 'banking or percentage game.' The California Penal Code also makes it a misdemeanor to make sports bets. But other wagers are not forbidden. It is not a crime to buy a lottery ticket, even in an illegal numbers games." Thus, his view is "So, at least in California, it seems it is not a crime to play *poker* online for money." (Emphasis supplied.)

I think the better, more legally supportable, conclusion is: playing poker for money in California at the popular online poker websites is illegal, but in today's tolerant atmosphere the risk of being charged with a criminal misdemeanor is far less than the chance of getting a speeding ticket, and the actual penalty to befall anyone who is charged will be not much more serious than the speeding ticket. Here is my analysis and reasoning to support that conclusion.

California Penal Code Sec. 330. provides: "*Every person who plays... any banking or percentage game played with... for money, checks, credit, or other representative of value, and every person who plays or bets at or against any of those prohibited games, is guilty of a misdemeanor...*" (Emphasis supplied.)

The conclusion Professor Rose reaches is correct for the situation where the player bets in an online poker game that is NOT also a percentage game. This is because playing poker for money in California is legal so long as the particular game being played does not run afoul of the other provisions of the law. Social home games are an example. As long as no one makes money, other than as a mere player, it is OK to play in a real money home poker game. In addition, playing in duly licensed California cardrooms does not run afoul of the prohibition because those cardrooms charge players in a manner that is not considered to be a percentage rake.

However, the conclusion is incorrect where the player bets in an online poker game if that game is a "percentage game." All of the major online websites that offer real-money betting on poker games charge a fee of some kind for the opportunity to play. Usually the fee takes the form of the website operator being entitled to a rake that is a percentage of the money in a given pot, limited to a maximum amount. In tournament play there is an entry fee that may be viewed as a percentage of the buy-in amount each player pays, the sum of which make up the prize pool to be split among the winners, since the amount increases as the buy-in amount increases. I am not aware of any online real-money poker games that do not have a rake or entry fee for most real-money poker games and tournaments.

I believe the existence of the rake or entry fee makes the poker game a percentage game, all of which are banned as a class by Section 330. In *Sullivan v. Fox*, 189 Cal.App.3d 673, 235 Cal.Rptr. 5 (Cal.App. 1 Dist., 1987) the interpretation of what constitutes a percentage game under California law was first stated. Three different methods of calculating the amounts to be paid to the house by players were considered: (1) a portion of each participant's winnings, (2) a fixed portion of the amount of each bet, or (3) the time that each participant plays. The court held that if either of the first two methods is used, then the game will be a percentage game. Only the third method was determined to be a permissible form the house could use and still avoid having the game be declared a percentage game. I believe the rake in real-money online poker games and tournaments falls into either or both of the first two categories mentioned in *Sullivan*.

Thus, if you are in California and are playing and betting money on poker games at one of the popular online websites,

you are violating the law.

Professor Rose also said: "...about half the states also make it a crime to make a bet under some circumstances, even though nobody is ever charged any more." If that observation is accurate, and given my analysis above, I think the proper question should focus on the legal consequences and risk to the player of getting involved in "illegal" online betting. The principal inquiry being the likelihood of any law enforcement authority doing anything about the player's engaging in that activity.

Professor Rose says that "nobody is ever charged anymore." Criminal charges against mere players are few and far between, especially because most such charges would be very low-level misdemeanors, sometimes only resulting in fines. However, since Professor Rose wrote the article there have been a few state criminal charges brought involving online betting under state laws making the bet a misdemeanor. The charges are only misdemeanors, but those charges can have adverse effects that go beyond the mere criminal charges.

In Florida a college quarterback, Adrian McPherson was tried on a misdemeanor charge brought against him for making sports bets through an offshore online bookie. The jury hung on the question of his guilt and he subsequently entered into a guilty plea agreement with the prosecutor on that and other pending matters. In North Dakota Jeffrey Trauman pleaded guilty to a misdemeanor charging him with making illegal online sports bets. Professor Rose has subsequently written a column about the Truaman matter appearing in *Card Player Magazine* (Vol 16, Mo. 21, Oct. 10, 2003.)

Thus, in my view, the better, more legally supportable, conclusion is: *playing* poker for money in California at the popular online poker websites is illegal, but in today's tolerant atmosphere the risk of being charged with a criminal misdemeanor is far less than the chance of getting a speeding ticket, and the actual penalty to befall anyone who is charged will be not much more serious than the speeding ticket. Professor Rose concludes his *Card Player* article saying: "Does this mean regular players are in danger of being arrested? Half the states do have ancient laws on the book making it illegal to make a bet. But, probably 20 million Americans make technically forbidden wagers each year. With odds like that, you are more likely to be elected governor of California than charged with illegal gambling."

#### End notes:

[1] A wealth of information can be found on his *Gambling and the Law* website, which says that "Professor I. Nelson Rose is recognized as one of the world's leading authorities on gambling law. He is an internationally known scholar, with more than 500 published works, and public speaker, often the keynote speaker on gambling issues. A 1979 graduate of Harvard Law School, he is a tenured full Professor at Whittier Law School in Costa Mesa, California, where he teaches one of the first law school classes on gaming law."

[2] The question of the legality of *offering* a real-money poker game over the Internet to players in California is a still undecided question under California law. Trying to figure out how a court may rule is a different and quite complicated matter. It involves determining where the game is being offered and played as well as the ability to assert legal jurisdiction over the owner-operator of the website offering the game.

Under Section 337] of the California Penal Code it is a misdemeanor to "deal, operate, carry on, conduct, maintain, or expose for play in [California] any *controlled game*" unless all required federal, state and local licenses have been obtained. Many local jurisdictions in California require licenses to be obtained in order to operate a cardroom in that jurisdiction. No online real-money poker website has a license from any California gaming authority.

A "controlled game" means any game of chance, including any gambling device, played for currency, check, credit, or any other thing of value that is not prohibited and made unlawful by statute or local ordinance.... [But] does not include any of the following: (A) The game of bingo conducted pursuant to Section 326.5. (B) Parimutuel racing on horse races regulated by the California Horse Racing Board. (C) Any lottery game conducted by the California State Lottery. [or] (D) Games played with cards in private homes or residences, in which no person makes money for operating the game, except as a player."

Poker games that are not "percentage games," and assuming further that they are "games of chance," are lawful under Section 330, so the offering of such games is subject to the requirement of Section 337]. Of course, if the online poker game is a percentage game, then the offering of it would be unlawful directly under Section 330.

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# Is U.S. Online Poker a Game of Skill?

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## Is Online Poker in the U.S. a Game of Skill?

By: Chuck Humphrey

### Introduction

Another new entry into the world of online poker cardrooms is poised to go live for "real money" soon. A press release by the developer of the software, which is a Los Angeles-based company formed under California law, says that in the near future:

"[We] will offer real money games and tournaments through...[a] licensee... in areas where online games of skill are permitted. [Our licensee] will be licensed and regulated by the Kahnawake Gaming Commission in Canada."

Thus, the corporate and licensing structure used by this room is along the lines of that used by fictional Hypo Online Gambling.

This article analyzes the legality of offering poker as a skill game online in the U.S. In making this analysis I have assumed that this room will charge a rake in the same manner as the majority of the other dozen or so online poker rooms. That is, the players will be charged a "Nevada-style rake" where the operator of the game is paid a percentage of the amount in the pot, up to a stated maximum dollar amount per hand.

The brains behind the new room include over a half dozen well-known U.S.-resident tournament poker players who apparently personally put up much of the money and most of the efforts to write and debug software to allow the room to operate on the Internet. They refer to themselves collectively as "the Team." The URL under which this online cardroom can be reached is shown in the domain registration records as being owned and administered by the Los Angeles-based software developer. [N.B. After the first publication of this article, the registration of the URL was changed on June 8, 2004, to the name of an offshore business, which provided the registrar's data base with an apparently fictitious telephone number. The URL, however, continues to use a domain server with a U.S. address and which is listed as belonging to a person who includes a portion of the name of the software development company in his name identification.]

No information is yet available on the place of formation of the licensee. I assume it will be in a foreign jurisdiction where it will obtain one of the easy-to-come-by cheap licenses such jurisdictions issue. See Online Gaming Licensing Reality. [N.B. After first publication of this article the licensee was disclosed. It is a business formed in Nevis, one of the West Indies nations.]

When the room goes "real-money live" I assume players will provide an address for themselves and will be able to deposit money into an account maintained by the licensee. [N.B. The gaming licensing statute in Nevis requires that players be registered with the licensee using a form approved by the local gaming board and that: "A person shall not be eligible for registration as a player unless he produces evidence that satisfies the licensee of the person's identity and place of residence and that he is at least 18 years of age." Assuming the Nevis-based company secured a license from Nevis, it will be interesting to see what documentation the gaming board and the operator deem adequate to satisfy the statutory requirements. I also note that the required documents will give the operator of the site and its affiliates actual knowledge of the place of residence of the player.]

The site now has separate tables named for each of the members of the Team. Those promoters play on the site from time to time and will continue to do so in the future. Here are some of the rather mild legal disclaimers in the software operator's recent press release:

"[This] software will give users of all skill levels the opportunity to play against these poker champions for fun or for real money where online games of skill are permitted...."

"[The online cardroom] will allow users of all skill levels to become involved in the game and learn from real champions...."

"Laws and regulations permitting and when users feel ready, they can also play against [our Team] members in low-stake, real money games, courtesy of [our licensee]. Any money won by [our Team] members in those games will be donated to an international charity by [our licensee]."

### Where are Online Games of Skill Permitted?

The software developer's press release says "[This] software will give users of all skill levels the opportunity to play against these poker champions for fun or for real money where online games of skill are permitted." The implication is that the poker games available will only be offered in states where games of skill played for money are legal. The best known games of skill played for money, which are also available online in the United States, are fantasy sports leagues. There are many such leagues. Some well-known, large companies offer such leagues.

A prominent example is the offering of the ESPN fantasy leagues. ESPN is a part of the Walt Disney-ABC-CapCities media conglomerate. The legal restrictions that ESPN has adopted (presumably on advice of its lawyers) for its football league include:

"This promotion is intended for play only within the 50 United States (and the District of Columbia) and Canada (except Quebec). U.S. law governs this promotion.

"Only open to U.S. residents, 13 years of age or older only. Void in all U.S. Territories (e.g. Guam and Puerto Rico) and where prohibited by law.

"If you are a resident of Arizona, Connecticut, Florida, Louisiana, Montana or Vermont, you are permitted to purchase and be a participant in the game, but not eligible to win any of the promotional prizes."

Thus, it is clear there are some states that do not allow wagering on even games of skill. By the way, a visit to the websites of three other prominent big-name players in the online fantasy sports skill-game arena shows similar lists of excluded states. However, there is no universal agreement on which states should be included and excluded. My research has the following jurisdictions excluded on one or more of those lists: Arizona, Arkansas, Connecticut, Florida, Iowa, Louisiana, Maryland, Montana, North Dakota, Tennessee, Vermont, Puerto Rico and Quebec, Canada.

Will the software developer tell potential players from those jurisdictions what ESPN tells players on its site—you can't win any money here?

### Is "Skill" a Relevant Factor?

The next logical inquiry is whether the game being promoted by the software developer would be a game of skill that could be played for money in those jurisdictions where games of skill played for money are legal.

The answer is NO.

I have not been able to find any case law that has ever squarely held poker to be a game of skill free from illegality under applicable state gambling laws. There have been some passing references to poker as a game of skill in a few cases.[1] But these are only references that go to whether any skill is involved in the game, not to the level of that skill as compared with the element of chance in the game. The actual decisions did not involve poker, let alone the more relevant question of the legality of offering poker games in a setting where the house directly or indirectly makes money by raking the game, charging an entry fee or selling food, beverage or merchandise to players.

Decided cases hold that in order to be a "game of skill" the elements of skill must predominate over those of chance determining the outcome.

That general rule is set forth in the California decision *In re Allen* as follows:

term 'game of chance' has an accepted meaning established by numerous adjudications. Although different language is used in some of the cases in defining the term, the definitions are substantially the same. It is the character of the game rather than a particular player's skill or lack of it that determines whether the game is one of chance or skill. The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game." [2]

There are many "crane game" and "digger game" cases. Those games involve exercising varying degrees of skill to win a prize by grabbing it or pushing it with a remotely controlled crane-like or shovel-like object. One of those cases shows the struggle that courts can and do go to in finding a game to be one of chance and not predominately skill.

In *State v. Gambling Device*, 859 S.W.2d 519 (Tex.App.-Hous) (1 Dist.), 1993) the court ruled against a digger game (called a "Bulldozer" in the text) being a game of skill in the following language:

"Even a contrivance that is predominantly a game of skill may be determined by chance. For example, assume that a novice player of Bulldozer, through a minimal exercise of skill, has a 25 percent chance of winning an award. Assume also that an experienced Bulldozer player, through the exercise of his superior skill, has a 75 percent chance of winning an award. Chance would appear to predominate over skill in the former case, while in the latter case; skill would appear to predominate over chance. Yet in either case, the outcome in each particular game played is 'determined by chance.' A player's level of skill may influence the degree of chance involved, but it does not eliminate the element of chance altogether. The outcome is always determined by chance because no player, through the exercise of skill alone, can control the outcome of any given trial. It is chance that finally determines the outcome of each and every trial. Thus, it is the incorporation of chance that is the essential element of a gambling device, not the incorporation of a particular proportion of chance and skill. *Id* at 523.

The body of law in the area of skill versus chance is a fractured one. What is needed is better understanding in statutes and case law of what constitute elements of skill, and how, in the overall balance, to compare the weigh of the particular elements of skill against the weight of the elements of chance that are present. The Wisconsin anti-gambling statute (sec. 945.01 (3)(b)(3) has a unique definition of skill in the context of machines like these. It says:

"In this subdivision, 'skill' means, within an opportunity provided for all players fairly to obtain prizes or rewards of merchandise, a player's precision, dexterity or ability to use his or her knowledge which enables him or her to obtain more frequent rewards or prizes than does another less precise, dexterous or knowledgeable player."

I suggest that those interested in improving the law on skill v. chance work on expanding that definition to better specify the principal elements that constitute skill and chance. A weighing mechanism that could be considered by a judge or jury should also be set forth. A few states have passed so-called Chuck E. Cheese laws to allow businesses to legally offer low-cost arcade games with prizes of a low value. That law in Georgia includes a definition of "some skill" that is of passing interest even though it does not cover the real question, which is what does it take for skill to be predominate. Here is the definition from the Georgia statute:

"[S]ome skill" means any presence of the following factors, alone or in combination with one another:

- (1) A learned power of doing a thing competently;
- (2) A particular craft, art, ability, strategy, or tactic;
- (3) A developed or acquired aptitude or ability;
- (4) A coordinated set of actions, including, but not limited to, eye-hand coordination;
- (5) Dexterity, fluency, or coordination in the execution of learned physical or mental tasks or both;
- (6) Technical proficiency or expertise;
- (7) Development or implementation of strategy or tactics in order to achieve a goal; or
- (8) Knowledge of the means or methods of accomplishing a task.

The term some skill refers to a particular craft, coordinated effort, art, ability, strategy, or tactic employed by the player to affect in some way the outcome of the game played... If a player can take no action to affect the outcome of the game, the bona fide coin operated amusement machine does not meet the 'some skill' requirement of this Code section.

For the time being, however, the law is such that poker is not a game in which the elements of skill predominate over chance. The time frame over which the elements that constitute skill in poker work to allow the more skilled player to "obtain more frequent rewards" is both uncertain and too lengthy.

Consider that on any one hand of poker it cannot seriously be contended that skill outweighs chance. Also, the results of any given session of poker (one night, one tournament, etc.) are not likely to be determined based on the preponderant skill of any given player. Perhaps the result of playing many sessions for a whole year is indicative of skill predominating over chance. But, perhaps not.

Poker "player of the year" awards have become popular over the past few years. No one has ever repeated as the winner from one year to the next. Indeed few repeat in the top ten of those lists from one year to the next.

This lack of certainty may be considered by a court in reaching the determination that while there are significant elements of skill in poker, they just do not outweigh the elements of chance caused by the fall of the cards and the erratic, unpredictable play of a large number of opponents.

The long time frame may push a court to reach the conclusion that skill is not the predominate factor since, at a minimum, it takes years, or perhaps a lifetime, to determine if a person is a "winning player." The anecdotal stories about most professional poker players, even those who were the best of their time, like Johnny Moss, Doyle Brunson and Daniel Negreanu, going broke is more "proof" of the chancy nature of the game.

### **Wither Thou Goest?**

So will this new online cardroom accept any players with domestic U. S. addresses? Businesses that have U.S. licensed casinos and also operate online casinos (and one that closed its online operation), reject real money deposits from anyone with an address in the U.S. They do so because it is the view of regulators that offering online casino-style gambling without benefit of a license from an appropriate authority in the state where the bettor resides is illegal. They do not want to jeopardize their U.S. licenses nor face criminal charges.

The new online poker room differs very little from those U.S. licensed businesses. The overall promoter is a California-based company formed under California law. The bulk of its shareholders (I assume) and all of its high-profile Team members are citizens and residents of various jurisdictions in the United States. They are thus amenable to personal arrest, indictment, and trial in one or more of the states where they reside or travel to in attending poker tournaments and promoting the business of this online cardroom.

The fact of licensing what is in all likelihood a "straw" man to serve as the nominal operator of the online cardroom under a license from the Kahnawake Gaming Commission in Canada seems a flimsy defense. It is all but certain that the Los Angeles-based software developer will receive the lion's share of the revenue generated by the operation of the online cardroom. If not, why would these talented, wealthy, young men and women have invested their time, money and prestige in bringing the site to life and promoting it?

Laws in all 50 states, and various federal anti-gambling laws, will be broken by this new online cardroom if it offers "real money" poker games under its current structure. The structure could be renovated to follow the more common practice of trying to put greater distance between the U.S. software developer and the actual named operator of the site. (3) However, that would not reduce the risk facing Team members that one or more of them may be charged with criminal violations. If the Team members actively promote, appear in advertisements for and encourage U.S. residents to play in the "real money" poker games on the site, they will be aiding and abetting the violations of the nominal operator. Aiders and abettors are equally as liable as the principal for criminal violations. In addition, a prosecutor may well convince a court to ignore the corporate shields used and hold the Team members liable as the de facto owners and operator of the online cardroom. If the Team members continue down the current path they could find themselves in serious legal difficulties.

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### **End notes:**

*Re v. Coats*, 158 Or. 122, 74 P.2d 1102 (1938) involved the question of whether a pinball game was an illegal lottery. The Oregon Supreme Court held in that case: "If a substantial degree of skill or judgment is involved, it is not a lottery. Of course, all forms of gambling involve prize, chance, and consideration, but not all forms of gaming are lotteries. A lottery is a scheme or plan, as distinguished from a game where some substantial element of skill or

judgment is involved. Poker, when played for money, is a gambling game, but, since it involves a substantial element of skill judgment, it cannot reasonably be contended that it is a lottery." 74 P.2d at 1106. (Emphasis supplied.)

We note that the Oregon Supreme Court did not say that offering poker games with a rake or profit to the house was legal under Oregon law. It said poker would not be deemed to be a lottery since an element of skill was involved. Lawyers say that an observation like that in a case is "mere dicta"—an opinion that has only incidental bearing on the case in question and is therefore not binding.

In the same vein, the Colorado Supreme Court in *Ginsberg v. Centennial Turf Club*, 126 Colo. 471, 251 P.2d 926 (1952) said:

"In Colorado a 'lottery' or 'gift enterprise' cannot be authorized by law. However, there is no prohibition in our Constitution which prevents the legislature, or the people, from authorizing certain forms of gambling. It unquestionably is true that all lotteries and gift enterprises are forms of gambling, but it does not follow that all gambling is a 'lottery' or 'gift enterprise,' as those terms are defined in law. No one would contend that a game of poker in which money is bet upon the relative value of the cards held by the participants, constitutes a lottery, but it most certainly is a form of gambling. 251 P.2d at 929

[2] 59 Cal.2d 5, 377 P.2d 280 (1961). This case involved the game of rubber bridge and held that bridge was a game of skill. For the "skill must be predominate" proposition the court cited the following cases: *People v. Settles*, 29 Cal.App.2d Supp. 781, 787 [78 P.2d 274]; *Boies v. Bartell*, 82 Ariz. 217 [310 P.2d 834, 837]; *State v. Hahn*, 105 Mont. 270 [72 P.2d 459, 461]; *Baedaro v. Caldwell*, 156 Neb. 489 [56 N.W.2d 706, 709]; *State v. Stroupe*, 238 N.C. 34 [76 S.E.2d 313, 316-317]; *D'Orio v. Startup Candy Co.*, 71 Utah 410 [266 P. 1037, 1038-1039, 60 A.L.R. 338]; see *Longstreth v. Cook*, 215 Ark. 72 [220 S.W.2d 433, 437]; *State v. Wiley*, 232 Iowa 443 [3 N.W.2d 620, 624]; *Adams v. Antonio* (Tex.Civ.App.) 88 S.W.2d 503, 505; cf. *Brown v. Board of Police Comrs.*, PRIVATE HREF="http://login.findlaw.com/scripts/callaw?dest=ca/calapp2d/58/473.html" MACROBUTTON HtmlResAnchor 58 Cal.App.2d 473, 479 [136 P.2d 617].)

[3] The URL for the online cardroom website is normally initially registered by and then maintained in the name of the nominal operator of the site. That operator is usually a business with limited liability, such as a corporation, formed under the laws of a foreign jurisdiction that offers gambling "licenses" to such companies. Furthermore, the nominal operator takes steps to become more than being a straw party. For example, many of the online cardrooms move the day-to-day operations of the site to the foreign country, typically one of the Caribbean nations, where the operator was formed. Taking those precautions does not eliminate the illegality of the offering of the games under state laws and some federal laws. However, as a practical matter it insulates the nominal operator from being charged with criminal violations under those laws since it is difficult, if not impossible, for the charging law enforcement authority to get actual personal jurisdiction over the business and those individuals who operate it on a day-to-day basis.

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## Wire Act

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### Federal Wire Wager Act

By: Jeffrey Rodefer

Extracted from: **Internet Gambling in Nevada: Overview of Federal Law Affecting Assembly Bill 466**,  
Courtesy of Liebert Publishing, Gambling Law Review

In 1961, Congress enacted the Wire Act [57] as a part of series of antiracketeering laws. The Wire Act complements other federal bookmaking statutes, such as the Travel Act (interstate travel in aid of racketeering enterprises, including gambling), the Interstate Transportation of Wagering Paraphernalia Act, and the Illegal Gambling Business Act (requires a predicate state law violation).

The Wire Act was intended to assist the states, territories and possessions of the United States, as well as the District of Columbia, in enforcing their respective laws on gambling and bookmaking and to suppress organized gambling activities.[58] Subsection (a) of the Wire Act, a criminal provision, provides:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.[59]

In order to prove a prima facie case, the government must establish that:

1. The person was "engaged in the business of betting or wagering"
2. (compared with a casual bettor);
3. The person transmitted in interstate or foreign commerce:
  - a. bets or wagers,
  - b. information assisting in the placement of bets or wagers, or
  - c. a communication that entitled the recipient to receive money or credit as a result of a bet or wager;
4. The person used a "wire communication facility;" and
5. The person knowingly used a wire communication facility to engage in one of the three prohibited forms of transmissions.

In analyzing the first element, the legislative history[60] of the Wire Act seems to support the position that casual bettors would fall outside of the prosecutorial reach of the statute. During the House of Representatives debate on the bill, Congressman Emanuel Celler, Chairman of the House Judiciary Committee stated "[t]his bill only gets after the bookmaker, the gambler who makes it his business to take bets or to lay off bets. . . It does not go after the causal gambler who bets \$2 on a race. That type of transaction is not within the purview of the statute." [61] In *Baborian*, the federal district court concluded that Congress did not intend to include social bettors within the umbrella of the statute, even those bettors that bet large sums of money and show a certain degree of sophistication.[62]

Some courts have construed the second element concerning transmission to mean just the "sending" of information and not the receipt thereof.[63] Other courts have interpreted the term "transmission" more broadly to include both parties using a wire communication facility. [64]

Term "wire communication facility" is defined, for purposes of transmitting as set forth in the third element above, as: [A]ny and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of

all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.[65]

The fourth element is that the person acted "knowingly." This does not mean that he or she knew they were violating the statute, but rather, the individual knowingly used an interstate wire communication facility to engage in one of the three forms of prohibited transmissions listed above.[66]

Subsection (b) of the Wire Act sets forth exceptions, also known as a "safe harbor" clause and provides:

Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information [(1)] for the use in news reporting of sporting events or contests, or [(2)] for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on the sporting event or contest is legal into a State or foreign country in which such betting is legal.[67]

The first exemption was designed to permit "bona fide news reporting of sporting events or contests." [68] The second exemption "was created for the discrete purpose of permitting the transmission of information relating to betting on particular sports where such betting was legal in both the state from which the information was sent and the state in which it was received." [69]

Subsection (c) simply provides that nothing contained in the provisions of the Wire Act shall create immunity from criminal prosecution under any state laws. [70] Finally, subsection (d) dictates when a telephone company or other common carrier, subject to the jurisdiction of the Federal Communications Commission, must terminate service when that service is being used to transmit or receive gambling information in violation of law. [71]

The language of the Wire Act clearly prohibits the use of the Internet for transmission of sports bets or wagers or information assisting in the placement of such bets or wagers, [72] unless transmission falls within one of the two exceptions noted above. The statute, however, does not expressly discuss its possible application to other forms of gambling. As a result, differing interpretations have arisen over the construction of the phrase "any sporting event or contest," and over whether the 40-year old Wire Act prohibits Internet gambling.

The interpretation of this language turns upon the determination of whether "sporting" is an adjective intended to modify both "event" and "contest." [73] Neither section 1084 nor the definitional section 1081 defines the term "sporting event or contest." A narrow construction would seem to suggest that the phrase is limited to sports-related activities. [74] There is support for this argument in the language of the statute, in the legislative history and in case law.

Statutory language: Section 1081 defines a "gambling establishment" as "any common gaming or gambling establishment operated for the purpose of gaming or gambling, including accepting, recording, or registering bets, or carrying on a policy game or any other lottery, or playing a game of chance, for money or other thing of value." [75] However, the term "gambling establishment" does not appear in section 1084.

A narrow construction approach is further bolstered by looking at the Interstate Transportation of Wagering Paraphernalia Act, [76] which was enacted as part of the same anti-organized crime legislation as the Wire Act. Section 1953 separately references bookmaking, wagering pools with respect to a sporting event, numbers, policy, bolita or similar games. [77] By contrast, section 1084 only references bets or wagers on "sporting events or contests." Similarly, the Illegal Gambling Business Act, [78] defines "gambling" to include "but is not limited to poolselling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." [79]

Legislative history: The legislative history of the Wire Act seems to provide support for a narrow construction. The title of the legislation is "Sporting Events- Transmission of Bets, Wagers, and Related Information." [80] The House of Representatives Report on Senate Bill 1656, dated August 17, 1961, states that the bill is in response "modern bookmaking." [81] In the "Sectional Analysis" of the report, the terms "sporting event or contest" and "sporting event" seemed to be interchangeable. [82] Included in the report is a letter from Attorney General Robert F. Kennedy to the Speaker of the House of Representatives, dated April 6, 1961, which only refers to wagering on sporting events. [83] However, the Congressional debates on this legislation concerned the bill's impact on "horse racing and other sporting events." [84]

Congress' use of these different terms reflect its knowledge of the various forms of gambling, including traditional casino games or games of chance and specifically limited the Wire Act's application to sporting events or related contests.[85] It is evident from the statement of United States Senator Jon Kyl of Arizona as he introduced the Internet Gambling Prohibition Act of 1997. [86] Specifically, Senator Kyl stated that the bill was necessary, because "[i]t dispels any ambiguity by making it clear that all betting, including sports betting, is illegal.

Currently, nonsports betting is interpreted as legal" [87] under the Wire Act. [88]

Case law: most notably the recent decision by the United States District Court for the Eastern District of Louisiana, clearly supports this conclusion. In *In re MasterCard Int'l, et al.*, a class action against several banks and credit card companies alleged unlawful interaction with Internet casinos in violation of RICO. [89] The various defendants moved to dismiss the action under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted. [90] The court held that the plain language of the Wire Act was limited to gambling on a sporting event or related contest. [91] The court reasoned that:

[T]he recent legislative history of internet gambling legislation reinforces the Court's determination that internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084. Recent legislative attempts have sought to amend the Wire Act to encompass "contest[s] of chance. . ." the "Internet Gambling Prohibition Act of 1999" . . . sought to amend Title 18 to prohibit the use of the internet to place a bet or wager upon a "contest of others, a sporting event, or a game of chance. . ."[92]

The case is currently on appeal to the Fifth Circuit.

If on the other hand the term "contest" is to be viewed more broadly to encompass traditional casino games or games of chance, then on-line gaming, as some have argued, [93] will be prohibited by the Wire Act.

Finally, there is a secondary debate ongoing about whether the definition of "wire communication facility" in section 1081 applies to the Internet. [94] Some have pointed to section 1084(d) and its reference to "common carriers" within the jurisdiction of the Federal Communications Commission to support the argument that "wire communication facility" is limited to telephone companies. [95] "Thus, absent a determination that it violates federal, state, or local law, use of the internet for gambling would not appear to implicate directly any of the FCC's common carrier rules." [96] Others simply argue that Congress chose to broadly define "wire communication facility" to cover a wide range of wire communication modes that were known and unknown in 1961, like the internet. [97]

"Despite the divergent views . . . , the official position as expressed by the Justice Department [during the Clinton Administration] and several state attorneys general is to treat the Wire Act as applying broadly and covering all forms of Internet gaming." [98]

#### End notes:

[57] See Sporting Events – Transmission of Bets, Wagers, and Related Information Act, Pub. L. No. 87-216, § 2, 75 Stat. 491, 552-553 (1961)

[58] See *United States v. McDonough*, 835 F.2d 1103, 1105 n. 7 (5th Cir. 1988); see also *Martin v. United States*, 389 F.2d 895, 898 n. 6 (5th Cir. 1968), cert. denied, 391 U.S. 919 (1968) (quoting 2 U.S. Code & Cong. News, 87th Cong., 1st Sess., 2631, 2633 (letter from Attorney General Robert F. Kennedy to Speaker of the House of Representatives, dated April 6, 1961)).

[59] 18 U.S.C. § 1084(a).

[60] See S. 1656, 87th Cong., 1st Sess. (1961); see also H.R. 7039, 87th Cong., 1st Sess. (1961)

[61] *United States v. Baborian*, 528 F. Supp. 324, 328 (D.R.I. 1981) (quoting 107 Cong. Rec. 16,534 (1961)).

[62] See id.

[63] See *Telephone News Sys., Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621, 638 (N.D. Ill. 1963), aff'd, 376 U.S. 782 (1964).

[64] See *Sagansky v. United States*, 358 F.2d 195, 200 (1st Cir. 1966), cert. denied, 385 U.S. 816 (1966) (focusing on the phrase "uses a wire communication facility for the transmission" the court held that an individual who holds himself out as being willing to and does, in fact, accept offers of bets or wagers over an interstate telephone line has used a wire communication facility); see also *United States v. Pezzino*, 535 F.2d 483, 484 (9th Cir. 1976); *United States v. Tomeo*, 459 F.2d 445, 447 (10th Cir. 1972).

[65] 18 U.S.C. § 1081.

[66] See *United States v. Southard*, 700 F.2d 1, 24-25 (1st Cir. 1983), cert. denied, 464 U.S. 823 (1983); *United States v. Cohen*, 260 F.3d 68, 76 (2nd Cir. 2001) ("it mattered only that Cohen knowingly committed the deeds forbidden by § 1084, not that he intended to violate the statute").

[67] 18 U.S.C. § 1084(b).

[68] Joseph V. DeMarco, Assistant United States Attorney, Southern District of New York, *Gambling Against Enforcement - Internet Sports Books and the Wire Act*, supra, n. 27, at 35.

[69] See 18 U.S.C. § 1084(c).

[71] See 18 U.S.C. § 1084(d).

- [72] See e.g., Cohen, 260 F.3d at 68 (the conviction of Antigua bookmaker who accepted wagers from New York was upheld as a violation of 18 U.S.C. 1804(a)).  
 See Anthony N. Cabot, Internet Gambling Report IV, at 247-248 (2001).  
 See United States v. Bergland, 209 F. Supp. 547, 549-550 (E.D. Wis. 1962), cert. denied, 375 U.S. 861 (1963) (a criminal statute, such as the Wire Act should be strictly construed)
- [75] 18 U.S.C. § 1081 (emphasis added).
- [76] See Wagering Paraphernalia - Transportation Act, Pub. L. No. 87-218, § 1, 75 Stat. 492, 553-554 (1961).
- [77] See 18 U.S.C. § 1953(a).
- [78] See Organized Crime Control Act, Pub. L. No. 91-452, § 803, 84 Stat. 922, 1091-1092 (1970).
- [79] 18 U.S.C. § 1955(b)(2).
- [80] See supra, n. 57.
- [81] See U.S. Code & Cong. News, 87th Cong. 1st Sess., 2631.
- [82] See id. at 2632-2633.
- [83] See id. at 2633-2634.
- [84] Baborian, 548 F. Supp. at 328.
- [85] "[U]ntil the legislature manifests its intent to include on-line gambling within the purview of present gambling laws, courts should not apply Section 1084 to Internet gambling activities." Harley J. Goldstein, On-Line Gambling: Down to the Wire?, supra, n. 1, at 8; see also Scott Olson, Betting No End to Internet Gambling, supra, n. 17.
- [86] See S. 474, 105th Cong., 1st Sess. (1997).
- [87] Id.
- [88] See e.g., Tom Lundin, Jr., The Internet Gambling Prohibition Act of 1999: Congress Stacks the Deck Against Online Wagering But Deals in Traditional Gaming Industry High Rollers, 16 Ga. St. U. L. Rev. 845, 863 (Summer 2000).
- [89] See In re MasterCard Int'l, et al., 132 F. Supp. 2d 468, 472 (E.D. La. 2001).
- [90] See id.
- [91] See id. at 480.
- [92] Id.
- [93] See Seth Gorman and Anthony Loo, Blackjack or Bust: Can U.S. Law Stop Internet Gambling?, 16 Loy. L.A. Ent. L.J. 667, 671 (1996); see also Mark G. Tratos, Gaming on the Internet, 3 Stan. J.L. Bus. & Fin. 101, 105 (Winter 1997).
- [94] See Cynthia R. Janower, Harvard Law School, Gambling on the Internet, 2. J. Computer - Mediated Com. 2, (September 1996) (<http://jcmc.huji.ac.il/vol2/issue2/janower.html>).
- [95] See id.
- [96] See American Gaming Association, Federal Laws and Regulations Affecting the Use of the Internet for Gambling, at 1 (September 19, 1995).
- [97] See supra, n. 94; see also Nicholas Robbins, Baby Needs a New Pair of Cybershoes: The Legality of Casino Gambling on the Internet, 2 B.U. J. Sci. & Tech. L. 7 (1996).
- [98] See Adrian Goss, Jay Cohen's Brave New World: The Liability of Offshore Operators of Licensed Internet Casinos for Breach of United States Anti-Gambling Laws, 7 Rich. J.L. & Tech. 32 (Spring 2001).

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**Laws: Cases and Codes : U.S. Code : Title 18 : Section 1084**

- United States Code
  - TITLE 18 - CRIMES AND CRIMINAL PROCEDURE
    - PART I - CRIMES
      - CHAPTER 50 - GAMBLING

*U.S. Code as of: 01/22/02*

**Section 1084. Transmission of wagering information; penalties**

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be

restored.

(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

7 Gaming L. Rev. 409

Gaming **Law Review**  
December, 2003

**Gambling and the Law®**

**\*409 IS IT A CRIME TO PLAY POKER ONLINE?**

I. Nelson Rose [FNa1]

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THE BIGGEST EVENT in the world of Internet **poker** took place not **online**, but in a casino in downtown Las Vegas.

As most **poker** players already know, on May 23, 2003, Chris Moneymaker won the World Series of **Poker**, and its \$2.5 million top prize, at Binion's Horseshoe Hotel & Casino. You could not write a script like this. Well, you could, but no one would believe it.

Start with the winner's name. It really is Chris Moneymaker. To get the money to travel from his home in Tennessee, he sold a 20% stake to his father for \$2,000. But in the movies heroes need not just a loving dad, but also a buddy. Let's see ... Moneymaker ... I know, have him sell a second 20% share to his friend, named ... David **Gamble**.

So Moneymaker, Sr. and Mr. **Gamble** get \$500,000 each. That leaves \$1.5 million for Chris. Sounds good. But now let's make this totally fantastic.

It costs \$10,000 to enter the WSOP. Some players pay cash. But let's have Chris put up only \$40 and win his entry fee through satellite tournaments.

The final kicker is Chris never before **played** in a live **poker** tournament, where you can see the other players' faces. Chris, like dozens of others at the WSOP, won his entry fee through **poker** games **played** entirely **online**.

This naturally raises the question of whether Chris was breaking the law. I get more email asking me whether it is **legal** to bet **online** than on any other subject.

The answer is, it depends.

It depends mostly on where you live. It depends also on how the game is being run. And, in the real world, it depends on whether anyone is going to do anything about it.

Federal law is clear. The federal government's interest in **gambling** is pretty much limited to organized **crime**. Federal statutes are written with phrases like, "Whoever being engaged in the business of betting or wagering ..." or "Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal **gambling** business ...."

A regular player cannot get into trouble with the federal government even if the **gambling** operation is blatantly illegal, unless he does something to help the business. Prosecutors have charged players with being part of the **gambling** business when they helped operators collect debts from other players. But the very few times the federal Department of Justice has gone after regular players, judges have thrown the cases out.

What about state laws? Here the question is more difficult, because many states long ago passed anti-**gambling** laws, which are still on the books. There was a time when state governments wanted to protect not only the health, safety and welfare of their citizens, but their souls as well.

**\*410** All states make it a **crime** to conduct some forms of unauthorized **gambling**. But about half the states also make it a **crime** to make a bet under some circumstances, even though nobody is ever charged any more. There are obvious exceptions to the anti-**gambling** laws. It would not make sense for a state to run a State Lottery and make it a misdemeanor to buy a ticket.

Many states also make exceptions for social **gambling**. For example, the Oregon Legislature passed a statute expressly exempting players in social games, like **poker**, from the prohibition on **gambling**, as long as the players do not help set up the game and the only money they make is from winning. But a player at a commercial **poker** website is not so clearly protected.

The only way to know for sure is to check the laws of your state. I do not know of any state which has passed a law stating that players can **play poker online**. The best you can hope to find is that the state simply has never made this form of **gambling** illegal.

California, for example, makes it a **crime** to **play** 11 named games, including "21," and any "banking or **age**" game. The California Penal Code also makes it a misdemeanor to make sports bets. But other wagers are not forbidden. It is not a **crime** to buy a lottery ticket, even in an illegal numbers game.

So, at least in California, it seems it is not a **crime** to **play poker online** for money.

[FN1]. I. Nelson Rose, J.D. Harvard Law School 1979, is a Professor of Law at Whittier Law School in Costa Mesa, California. He is recognized as one of the world's leading authorities on **gambling** law and is a consultant to governments and industry. Professor Rose can be reached at his website: [www. GAMBLINGANDTHELAW.com](http://www.GAMBLINGANDTHELAW.com). **Gambling and the Law®** is a registered trademark of Professor I. Nelson Rose, Whittier Law School, Costa Mesa, California.

END OF DOCUMENT

# Internet Gambling Report

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## Extracts: Internet Gambling Report Sixth Edition

By: Chuck Humphrey

Here are a few facts, statistics and observations culled from *Internet Gambling Report, Sixth Edition* (The River City Group, copyright 2003.) [1]

### Legality of Online Gambling Websites:

"If no specific Internet gambling legislation is adopted, the off-line rules remain applicable to the virtual world. Gambling Web sites are subject to the same regulatory and licensing requirements as the off-line world. What is illegal off-line remains illegal online; it is illegal to offer (Internet) gambling services to consumers resident in a country where a license has not been granted by the appropriate authorities." *(Parentheses are in the original text.)* [2]

### Who Gambles Online?

In Chapter 5 Sue Schneider [3] summarizes the results of a survey of 2,900 gamblers from thirteen countries conducted in July and August of 2001. She notes: "The majority of gamblers, 83%, play online, however, only a third of that group plays for real money. In other words, the major attraction for online players is Web sites that offer free games. In all, 28% of those who gamble do so online for real money." [4] She also says: "Seventy-three percent of those who play for real money both online and offline lost money in the past month, while 80% of land-based-only players lost money. Online gamblers, however, lose more money. Those who gamble for real money both online and offline lost in the past more than double what those who gamble exclusively off line lost. Further, there are more than four-times more rollers (percentage wise) among the online players than there are among land-based-only players." [5]

### Financial Services Industry View of Wisdom of the Proposed *Unlawful Internet Gambling Funding Prohibition Act*

Two of the contributors to the compilation discuss and opine on the effects of the passage of federal legislation like the pending Unlawful Internet Gambling Funding Prohibition Act, which passed the U. S. House on June 10, 2003 by the overwhelming vote of 321 to 101.

"...[L]egislation that would prohibit any financial institution in the United States to facilitate in any way any part of an online gaming transaction has been seriously debated in the U.S. Congress since 2001... If passed, this type of law would formally deputize the banks and processors and put practical 'teeth' in place that could eliminate most of the revenues online gaming operators receive from the U.S. market—which constitutes arguable 60 percent or more of the total market worldwide.

"While this type of sanction is understandably tempting, because it disrupts the industry's payment flows from players, nevertheless it is a dangerous precedent for government to impose, or for the financial services industry to accept. Previously, only when there has been a demonstrably national policy concern, such as the need to stop drug lords and terrorists from money laundering, has there been sufficient justification for using the U.S. banking system as the primary instrument of enforcement of laws. The fear of the financial services industry is that if it is made a reluctant partisan and primary enforcer of a ban on online gambling funds movement, if it can be deputized for such a frivolous and insignificant purpose, what will keep Congress from turning to the industry again and again, with more and more requirements and restrictions, for other issues du jour? [6]

### Advertising in the United States

The compilation contains a truly excellent article on the history, background and legality of gambling advertisements in the United States. The contributor has previously published much the same information (in three parts) at an adult website. [7] The conclusion expressed puts the best foot forward for the online gambling industry. I suggest a thorough

reading of the entire article to truly appreciate the enormity of the problems confronting advertising by an online gambling website that is not licensed in the United States. The contributor says in conclusion:

"Advertising liability issues are subject to a different analysis than the liability associated with operating an online gambling business itself. Advertisers have different, and better, constitutional arguments against the application of laws prohibiting commercial speech—even speech associated with gambling. However, a multitude of intangibles play into the risk factors associated with any particular advertising campaign. Some of these issues will work themselves through the courts in the coming years. Others will remain as variables in the analysis. Issues such as the legality of the underlying business activity have not been resolved by the courts. Online gambling is substantially different in nature and character than land-based gambling. None of the typical justifications asserted as a basis for gambling regulation, such as infiltration by organized crime or increase in prostitution, appear to apply to online gambling operations. These differences may be exploited in future cases to convince the courts to treat the advertising of online gambling differently than traditional gambling promotion. Industry participants are in a unique position to influence the development of advertising law applicable to online gambling businesses, given the lack of any controlling decisions in the field." [8]

Immediately before this conclusion the author notes some *practical and political realities*, as follows:

"Certain fundamental realities regarding the advertising of Internet gambling cannot be ignored when analyzing the advertising liability issue. A relatively low-key mailing or Internet promotion is simply less likely to garner the attention of law enforcement than a prime-time television advertising blitz. The content of the marketing material itself will also bear on the likelihood of government intervention. The use of sexually oriented images or suggestive language will make a promotional piece stand out to law enforcement." [9]

#### End notes:

[1] Anthony Cabot, a well-known gambling law attorney and partner in the Las Vegas law firm of Lionel Sawyer & Collins, is the Founding Editor of this compilation. The publisher of this volume, The River City Group, is affiliated with a trade association for online gambling enterprises, the Interactive Gaming Council. <http://www.igcouncil.org/>

[2] *Internet Gambling Report Sixth Edition* at 337. The context of quotation indicates that the observations is specifically applicable to Internet gambling in various European nations. This portion of the compilation, chapter 20 *The EU and Cross-Border Challenges*, and is written by Phillippe Vanhummick "a senior partner of [a] Belgian law firm...and a visiting professor in European law at Ghent University... He is a member of the International Masters of Gaming Law. He has a very important pan-European gaming law practice advising both operators and regulators in several European jurisdictions. He has been involved in all gaming law cases before the European Court of Justice, including those currently in court...."

[3] She is the CEO/President of the River City Group and serves as chairman of the Interactive Gaming Council, a trade association with 75 members as the time of the writing of her chapter.

[4] *Id* at 56.

[5] *Id* at 57, footnotes omitted.

[6] *Id* at 86-7. The contributors are Charles Crawford and Melody Wigdahl. He is the director of strategic development for Surefire Commerce, a publicly-listed Montreal-based provider of processing services to electronic commerce merchants. Her Cincinnati-based firm is Glenjirk West, which specializes in payment and fraud screening solutions for clients.

[7] The contributor is Lawrence G. Walters, a partner in the San Diego office of the law firm Weston, Garrou & DeWitt. The three previous articles can be read at:

[http://www.theadultwebmaster.com/legalcorner/casino\\_ads\\_01.phtml](http://www.theadultwebmaster.com/legalcorner/casino_ads_01.phtml)

[http://www.theadultwebmaster.com/legalcorner/casino\\_ads\\_03.phtml](http://www.theadultwebmaster.com/legalcorner/casino_ads_03.phtml)

[http://www.theadultwebmaster.com/legalcorner/casino\\_ads\\_05.phtml](http://www.theadultwebmaster.com/legalcorner/casino_ads_05.phtml)

[8] *Id* at 314.

[9] *Id*.

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# The Surf's Up



## Gambling Online: Is it Legal?

June 2003  
the-surfs-up.com  
Volume 1, Issue 15



## Sportsbetting Bob's *Sport's Picks*



## Sports Remember When? *Sports Trivia*

### Gambling Online: Is It Legal?

by Shannon Dorey

The issues involved in legislating online gambling are a lot more complicated today than they were six years ago when Sen. Jon Kyl (R-Ariz) first introduced the bill known as the Internet Gambling Prohibition Act of 1997. At that time National News reporter David Isaacson had written that online gambling had grown into a 300 million dollar industry and there were about 32 online gambling sites.

In March 2002, Andy Sullivan of Reuters reported that Christiansen Capitol Advisors estimated gambling sites took in about \$2.2 billion in revenues in 2000, and would collect \$6.4 billion by 2003. At the time Sullivan wrote his article, there were about 1400 online casinos. Today there are between 1800 and 2000.

Back in 1997 the American economy was still booming and dot.coms hadn't yet gone bust but today advertising revenue from offshore gambling sites fuel the Internet economy. Over the past few years, Internet businesses have been scrambling to stay afloat and the advertising revenue from these gambling sites has been too irresistible to refuse. If that revenue were to be suddenly cut off, many Internet companies would feel the crunch.

David Schepp of the BBC reported in February that online gambling had become the fifth largest advertiser online, jumping to 2.5 billion from 910 million ads last year. "Online gambling firms are now advertising on more mainstream sites, thus appealing to whole new groups of gambling enthusiasts."

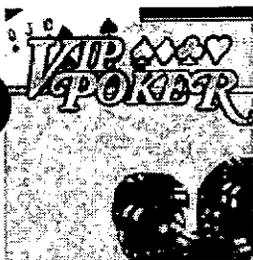


Not everyone believes that Kyl's legislation will prevent Internet gambling in the US. Rep. John Conyers D-Mich thinks Kyl's legislation would do little to stop online gambling and in March introduced a bill that competes with the legislation. The bill would create a five-member federal gaming commission, appointed by Congress, to study Internet gambling for one year and recommend the best methods of regulating it.

Doug Abrahms of the Reno Gazette-Journal quoted Conyers as saying, "You might remember a failed experiment the U.S. government tried in the 1920s called Prohibition... Instead of a prohibition that will drive gambling underground and into the hands of unscrupulous merchants, Congress should examine the feasibility of strictly licensing and regulating the online gaming industry."

Abrahms also quoted Rep. Ron Paul, R-Texas who said "This whole idea of the invasion of our house (by Internet gambling) is incorrect. You do have the brains to turn it off... We're trying to regulate behavior."

In an editorial he wrote in February Conyers said, " If you want to prevent money laundering, the last thing you would do is eliminate the financial controls and record-keeping that credit cards and U.S. bank accounts provide. .... Children can be kept off of gambling websites, however, by requiring the use of a credit card, PIN numbers, and other screening devices. ....



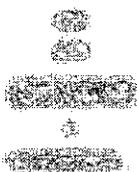
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He interviewed Charles Buchwalter, head of media research at Jupiter Media Metrix who said that, "Online casinos are now competing for advertising with the most visible industries, including retail, financial services and travel...The fact that casinos are [moving] their ad-buys from niche sites to mainstream portals is proof that this sector is going mainstream," Buchwalter says.

Those "mainstream portals" include sites like Yahoo! and Excite."

Since most of these offshore gambling sites are out of the reach of US authorities and are legal in the countries where they exist, there is really little US authorities can do to stop them. Roy Mark of JupiterMedia.com reported in March that 60 percent of all offshore gambling dollars comes from Americans.

According to the Justice Department, Internet gambling is illegal for Americans. The courts have ruled that under the 1961 Wire Wager Act, which prohibits the use of phone lines for placing sports bets, Internet sports betting is illegal.

Jay Cohen, who was president of the World Sports Exchange (WSE) in Antigua, was one of the first of 22 defendants charged in March 1998 under the Wire Act.

Reporting for Yahoo Internet Life in 1999, Justin Ware described how the then 27 year old Cohen, who had been a trader on the San Francisco Stock Exchange had started one of the first online sports books in 1997 by working out of a small office suite in Antigua. "After a couple of investors agreed to back him, he persuaded two friends to join him: Steve Schillinger, an options trader with more than 18 years of experience and a head for numbers; and Haden Ware, a student Cohen had met on the trading floor. The World Sports Exchange was born."

According to Ware (no relation to

Finally, we must also consider the needs of problem gamblers. Online gambling sites present difficulties for these individuals, just as land-based casinos do. Using the Internet, however, it is possible to set financial limits on an individual's gambling, through the use of shared record-keeping."

James Pearce of ZDNet Australia reported last February that the Interactive Gambling Act passed in Australia in July 2001 had done little to stop Internet gambling. Although the Act specifically banned Internet gambling, it still allowed online sports betting and lotteries to continue legally.

Pearce interviewed Chris Downy, executive director of the Australian Casino Association who reported the results of a survey done by the Association. The yearlong survey found that 40 percent of online gamblers still visited overseas casinos. Downy also noted that the survey showed the number of online gambling sites visited by Australians had increased by 38 percent between February and December 2001, despite the legislation being introduced in July.

"The level of interest in online gaming remained relatively consistent throughout the year and actually increased in July 2001, at the same time as the introduction of the Interactive Gambling Act" he said.'

Under the legislation, it is an offence to provide an interactive gaming service to customers in Australia and to advertise such services-including online casino-style services involving games of chance or mixed chance and skill, such as roulette, poker, craps, online poker machines and blackjack. However, betting on horses or greyhound racing, or other sporting events and lottery services are currently exempt under the act.

One of the reasons Internet casino gambling was banned in Australia was because of increased incidents of problem gambling in areas where

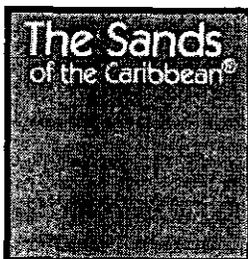
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Justin Ware), nearly three years after the launch of their business, Jay Cohen was in Seattle awaiting trial, and Schillinger and Ware were considered fugitives. Cohen chose to go back to the US and fight the charges; Ware and Schillinger chose to stay and run the business. Fortunately for them, and frustratingly for the FBI, as long as they stayed in Antigua, they couldn't be touched. Since extradition requires both countries to agree on the offense, and Antigua considers online gaming to be perfectly legal, Ware and Schillinger couldn't be extradited, Ware reported.

"Haden Ware was a student on his summer break when he went down to help Cohen and Schillinger, "When I first came down here, I was going to school...Jay called me up and said, 'I'm going to the Caribbean. Are you in?' And I said, 'Yeah, I'll come down, take a summer off, have a good time.' It's turned out to be a little bit longer than that," He was reported as saying.

Steve Kanigher quoted Cohen in the Las Vegas Sun in March as saying that when he decided to go back to the US to fight the charges he had a conversation with Schillinger. "I said that I would come back to fight this. He said that he was staying there in Antigua. I said one of us is making the right decision."

Ware reported that the decision to work from Antigua was intended to keep things legal. He quoted Schillinger as saying, "We were very open about what we did.... If we could have done this in San Francisco, we would have. We came down here because we thought we would be licensed to do what we wanted to do."

Stephen Nover of The Prescription reported in October that Cohen didn't believe he was breaking any laws. He was accepting wagers in Antigua, where bookmaking is legal. He came back to America to fight the charges and was the only defendant of those charged who challenged the system.

land based electronic gaming machines had been installed such as in New South Wales and Victoria. In areas where there was less accessibility to the electronic gaming machines there were fewer gambling problems. Whether these land based machines can be considered equivalent to Internet gambling sites is difficult to say.

During inquiries to the Interactive Gambling Bill in 2000 the committee also received evidence that despite the availability of online racing services to Australian homes there was little evidence of a parallel increase in problem gambling. The Home Racing channel, which had been available on Sky Channel in Australia since Sept 5, 1998, had not resulted in a perceptible surge in problem gambling. It was noted, however, in the report that there were insufficient studies on sports betting in general to determine its impact on problem gambling.

This is different than what is happening in the US where the Wire Wager Act appears to bans sports betting but not online casino betting. The discomfort with sports betting in the US may be attributed to point shaving scandals that have occurred in amateur sports.

In his article, McCory reported that "in congressional testimony last summer, William Saum, the NCAA's director of agent, gambling and amateurism activities, warned that online betting could lead to a resurgence of the point-shaving scandals that tarnished basketball programs at Northwestern University and Arizona State University during the 1990s.

"When people place wagers on college games, there is always the potential that the integrity of the contest may be jeopardized and the welfare of student-athletes may be threatened," Saum said."

Point shaving scandals have been going on in amateur sports since as far back as 1947. CNN reported in March 1998 that thirty-two players at

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Nover reported, "After losing his case in a controversial manner when the judge instructed the jury how to vote, Cohen appealed. He lost his appeal two years ago, and found out in June that the Supreme Court would not review his case.

U.S. District Judge Thomas Griesa sentenced Cohen to 21 months in federal prison and a \$5,000 fine." Cohen began serving his time on October 15.

Of the initial group charged in 1998, thirteen pleaded guilty and seven are still fugitives including Steve Schillinger and Justin Ware who are still in Antigua.

Today World Sports Exchange is one of the largest sports books in the world with a customer base estimated to be around 30,000.

Mark Fineman of Business 2.0 wrote an article on the World Sports Exchange and of Schillinger and Ware in October 2000.

"Meanwhile, when they're not holding epic pool parties, they're running WSE and watching the money come in -- and there's a lot of money coming in. In the two and a half hours it took U.S. District Judge Thomas P. Griesa to sentence him, Cohen's website in Antigua took in seven times his \$5,000 fine in bets on the New York Yankees-Oakland A's game alone, a fraction of the tens of thousands of dollars' worth of Internet bets placed with WSE that day," Fineman reported.

He quoted Schillinger as saying, "I was a great citizen of the U.S. I coached my kids in the Little League [and the Catholic Youth Organization basketball league]. My assistant coach was an FBI agent. He knew what I was doing. I gave a lot to my community, and for them to say I'm a criminal? Don't tell me the U.S. government thinks gambling is the worst thing in the world."

Last March Kevin McCory of USA

seven schools were implicated in a plot to fix 86 games between 1947-50. Included in the scandal were players from City College of New York and Kentucky (big names involved: Ralph Beard, Alex Groza and Sherman White). Other point shaving investigations went on between 1959-61, 1978-79, 1984-85, 1989, 1992, 1994, 1995, 1996 and 1997.

In his article last March McCory interviewed Steve Schillinger about bets being placed online for college basketball's March Madness. Schillinger told McCory that he expected the World Sports Exchange to have rung up as much as \$2 million in bets for each day of the tournament. He quoted Schillinger as saying that even the Super Bowl, another major draw for sports gamblers, "is sort of a non-event in comparison."

Online sports betting tout Bob Hill believes the point shaving scandals have more to do with the fact that amateur players aren't paid for their participation in college sports. "The NCAA makes billions of dollars off of these amateur sports and yet the athletes never see a penny of that money. It has nothing to do with the Internet," he said. "These kids are easy prey because they are poor and need the money. It is not as if you can hold down a part time job when you're in a major college athletic program because it's a full time commitment. These kids barely have time to attend classes. Shaving scandals were going on long before the Internet."

Jennifer Goldblatt of Delaware Online, reported that sports betting is a more specialized form of gambling and attracts a much smaller set of gamblers than activities such as slots. She interviewed William Eadington, director of the Institute for the Study of Gambling and Commercial Gaming at the University of Nevada-Reno who said, "With sports betting, even though there's a following, it tends to be one of the more technically challenging to do it right, ... quite a bit of analysis that is done and

Today interviewed Sebastian Sinclair, CFO of Christiansen Capital Advisors; a New York consulting firm that studies the gaming industry. He said, "Online sports gambling is clearly illegal today...But how effective has that prohibition been so far? Not very."

In October Michael Hiestand of USA Today, quoted Joe Read, who directs customer service for a Costa Rica-based sports betting site, as saying that Cohen's conviction led "industry people to protect themselves by getting local people to front their businesses. That's the loophole. An American can run the business but no one can find out," he said.

Hiestand also interviewed industry consultant John Musch who said bettors would inevitably find their way around any ban, especially as more countries begin to allow online betting. According to Musch the U.S. needs to regulate Internet gambling. "The legitimate operators would welcome that since they'd then seem more legitimate."

When the authorities first used the Wire Act as the basis for their charges against online gambling sites there were questions as to how well the act would hold up under the law. The Interstate Wire Act of 1961 prohibits sports wagering between states using telephone lines or through other wired devices. Since the Internet had not been in existence in 1961 there were questions as to how that could possibly apply to the Act.

In June 1999, Tim Ito and Sharisa Staples of the Washingtonpost.com reported, "despite the Justice Department action, many legal scholars question how well existing laws can be applied to new technologies. The Wire Act, for example, does not explicitly mention the Internet. It is also unclear how well the law would apply to satellite based transmissions, which are not considered wired devices."

Ito and Staples quoted Nelson Rose,

marketing, as opposed to a slot machine, which is a pure chance game."

George F. Will, of Newsweek reported in November, "Gambling has been a common feature of American life forever, but for a long time it was broadly considered a sin, or a social disease. Now it is social policy: the most important and aggressive promoter of gambling in America is government.

Forty-four states have lotteries, 29 have casinos, and most of these states are to varying degrees dependent on you might say addicted to revenues from wagering."

Cohen, who was interviewed by Kanigher in the visiting room at the Nellis prison, said, "I would respect Congress more if they said all gaming is bad and that they want to ban all gaming," Cohen said. "I wouldn't agree with it but I would respect it. But their real motivation is nothing more than anti-competition. It's protectionism. They're just trying to protect their home-grown industries."

The position of the American Gaming Association, which represents the commercial casino entertainment industry, has remained constant since Congress first began considering Internet gambling legislation. According to Frank Fahrenkopf, President and CEO, the association "maintains the view that the technology necessary to provide appropriate regulatory and law enforcement does not presently exist with regard to Internet gambling... until those concerns can be adequately addressed, the AGA remains opposed to Internet gambling."

Benjamin Grove of the Las Vegas Sun reported in March that MGM MIRAGE, one of the largest operators of Las Vegas Strip hotels, last year became the first major U.S. gambling company to open an online casino, based in and regulated by the Isle of Man off the coast of Great Britain. MGM's online casino does not accept

professor of law at Whittier Law School who said, "Changes in [gambling] law follow changes in society...But our society has been changing so rapidly . . . sometimes the law cannot keep up."

Kanigher reported that some legal experts believe the Wire Act applies only to sports wagering. Kanigher cited a federal ruling in Louisiana upheld in 2002 by the 5th U.S. Circuit Court of Appeals that had come to the same conclusion. "The courts ruled against two Internet gamblers who sued credit card companies and banks after accumulating gambling debts from casino-style gaming websites.

The gamblers argued that the credit card companies and banks, working in conjunction with the websites, created a worldwide gambling enterprise that facilitated illegal gaming, making their debts unenforceable. But as part of their dismissal of the lawsuit, both courts ruled that the wire act applies only to bets on sporting events or contests."

While the existing laws continue to be confusing some senators are trying to get new legislation passed to make online gambling illegal once and for all. In an attempt to stop it at the source, Sen. John Kyl's (R.-Ariz) most recent legislation wants to cut off American access to Internet gambling sites by prohibiting U.S. banks, credit card companies and other Internet payment systems from making payments to the gambling sites.

The bill would allow the State and Federal Attorney Generals to request injunctions against financial institutions, Internet Service Providers, or computer software providers that fail to assist in the prevention or restraint of Internet gambling. The Kyl bill, S. 627, applies criminal penalties of up to five years in prison to operators of Internet gambling sites.

The Senate Banking Committee expressed strong support for the Kyl bill during a hearing in March. The

bets from the United States.

BBC World ClickOnline's Richard Taylor reported in November that "to keep Americans out, MGM has built a system that uses technology to monitor where players are betting from.

"We are 99.9% confident it catches anybody who's not of age or from places that don't currently allow online gaming for its citizens or operators," said Bill Hornbuckle of MGM Mirage Online.

MGM say their geographical verification software can identify where customers are coming from and prevent them from using the site."

Grove interviewed MGM MIRAGE spokesman Alan Feldman who said the Conyers proposal is a welcome indication that some lawmakers have open minds about how technology and the public appetite for gambling have evolved.

Taylor reported that attitudes are changing in Vegas by some of the entertainment corporations which run the Vegas casinos but that there is still apprehension by some companies because of the legalities involved. He interviewed David Strow of Harrah's Entertainment who said, "We've spent the last 65 years building up this company. We now have more than 24 casinos across the country, and billions of dollars invested. But the way it works in the US is that each of these casinos has to be licensed by a state in order to operate. They view it as a privilege not a right. If we're found in violation of federal or state laws regarding Internet gaming they have the right to take our licences. In essence we could lose our ability to operate our properties."

Kanigher reported that Nevada Gov. Kenny Guinn signed into law a bill in 2001 that directed state regulators to develop ways to license and regulate Internet gaming companies as long as they operated in compliance with

House Judiciary Committee's subcommittee on crime passed the House version of the bill authored by U.S. Rep. Jim Leach of Iowa in May. It had already won the support of the House Financial Services Committee in March. The legislation has previously passed both the Senate and the House, but never in the same session of Congress.

Many credit card companies have already distanced themselves from online gambling. According to Beth Cox of Ecommerce News, as of July the list includes Bank of America, Fleet, MBNA and Chase Manhattan, as well as Citibank, which controls about 12 percent of the U.S. credit card market.

Cox further reported that credit card transactions are often coded to indicate what is being bought or sold. By blocking certain codes, banks that issue credit cards can avoid issuing credit for much of the gambling activity that occurs on the Internet.

This sounds logical in theory but according to information made available by the Australian Bankers' Association in late April, this is not always easy to do. The recommendations, which pertained to the Interactive Gambling Act that was passed in Australia in June 2001, reported a number of problems in being able to block credit card transactions.

The Association reported that the blocking of service codes, would likely be effective for credit card purchases occurring directly between the customer and the gambling merchant, provided the merchant has correctly coded the gambling transaction. However there appeared to be a number of means by which the correct identification of illegal interactive gambling transactions might be avoided. One possibility was for gambling merchants to use incorrect credit card transaction service codes in order to avoid identification of gambling transactions.

federal laws. Kanigher interviewed Nevada Gaming Control Board Chairman Dennis Neilander who said that those regulations have not been developed because of the Justice Department's position that all Internet gaming is illegal.

"The state law requires us to make a finding that it can be done applicable to federal laws," he said. "As long as the Department of Justice takes the position that it can't be done, we won't override that.".... "It's kind of a gray area right now because you're transmitting across state lines, so the federal law comes into play, and the federal law is unclear," he said.'

Susan Orenstein of IDG reported in June 2001 that the significance of Nevada legislators passing a law that paves the way for online gambling was that it indicated an "emerging shift in attitude of the casino industry. U.S. casino operators, who control \$22 billion in legalized gambling, once strongly opposed betting on the Internet."

According to Reuters, Merle Berman, a Republican lawmaker from Las Vegas and the primary backer of the Nevada bill, said online gaming taxes and fees could generate more than \$80 million annually for the state, reported Richard Stenger of CNN in June 2001.

A bill to study Internet gambling sponsored by Assemblymen Gary Guear and Anthony Imprevuto cleared a committee of the New Jersey Assembly, Interactive Gaming Council (ICG) reported in March.

Speaking before the Assembly Tourism and Gaming Committee, Imprevuto said, "Internet gambling is not coming, it's here." According to his testimony, the sponsors of the legislation want to make sure that citizens are protected by proper regulation of this activity, and that avenues of potential tax revenue are explored.'

Britain is also moving towards

The Australian government initially promised amendments to the 2001 Interactive Gambling Act that would consider the feasibility of blocking credit card transactions for overseas gambling sites. It has since backed away from introducing such rules, warning there were many problems with that level of regulation.

The Australian Bankers' Association also pointed out that gambling sites, which are legal in their own countries, could easily set up player accounts with offshore financial institutions. They also cited the use of online payment providers as a means for individuals to make transactions with online gambling sites.

In the past companies like PayPal predominated the online gambling payment market. This is no longer the case, however, since PayPal recently decided to stop taking gambling payments due to the uncertainty of the law.

In June New York Attorney General Eliot Spitzer subpoenaed PayPal's records relating to the use of the payment service by gamblers. At that time PayPal agreed to stop online gambling companies from using the service to accept money from gamblers who resided in New York State. In August Beth Cox of InterneNews.com quoted a spokesperson from PayPal as saying, it was "taking the action in "voluntary cooperation with the attorney general and was not admitting to a violation of law.""

Cox reported that under the settlement, PayPal agreed not to process payments to online gambling sites from New York customers as of Sept. 1 and would pay \$200,000 to New York State to cover costs of the investigation and penalties.

Joanna Glasner of Wired.com reported in July that under the terms of its planned purchase of PayPal (PYPL), eBay decided that it would stop offering the payment service for Internet gambling transactions. It attributed the decision to an

legalizing Internet gambling. Rick Smith, executive director of the IGC, which is located in Victoria B.C., Canada, praised the United Kingdom in March for its major reform of regulated gaming.

According to the IGC, "plans call for Britain to license online gaming operators who locate their servers there. The process will include a thorough investigation of the operators' backgrounds and testing of their hardware and software. Gaming Web sites will be strictly monitored to protect players, prevent money laundering and prohibit minors from gambling at the sites."

Peter Dean, chairman of the Gaming Board for Great Britain, addressed members of the IGC at their meeting in London in February. He indicated that a package of gaming regulation reforms - including the full legalization and regulation of interactive gaming - should be enacted next year, with implementation in 2005.

Although Britain's broadband availability trails many other European countries, the United Kingdom could lead Europe in online consumer revenue by 2005 thanks to its relaxed attitude toward Net gambling, Peter Judge reported for CNET in December 2001.

According to research from Schema Consulting, \$38 billion will be spent on online entertainment in Europe in 2005 and online gambling will be the largest industry. "The United Kingdom will take 35 percent of the overall spending, said Schema President David Brown, because it is more accepting of gambling, and other countries are more likely to have laws restricting it," Judge reported.

"British leaders understand the importance and the value of regulating this relatively new means of gaming, I only wish the U.S. government would take such an enlightened approach, instead of futilely attempting to block a form of entertainment that millions of its citizens enjoy," Smith said.

"uncertain regulatory environment surrounding online gaming."

Under the USA Patriot Act, it is prohibited to transmit funds known to have come from a criminal offense, or that are intended to promote or support unlawful activities. Attorney for the Eastern District of Missouri told eBay that its online payment service PayPal had violated provisions in the USA Patriot Act between October 2001 and July 2002, Dawn Kawamoto reported for CNET in March.

It was alleged that PayPal violated laws regarding the processing of online gambling payments, and eBay the parent company of PayPal was asked to hand over nine months of the gambling-related earnings in the settlement.

According to Brian McWilliams of Wired.com nearly 500 gambling sites signed up to accept PayPal in the first quarter of last year, almost doubling the company's roster of such merchants, which stood at 1,022 as of March 31, 2002. McWilliams reported in June "in exchange for taking such a risk, PayPal was expected to derive more than \$16 million from Internet gaming in 2002. Already this year, its revenues from such merchants – who pay higher fees to offer the PayPal service – have more than doubled, accounting for 8 percent of its total income."

Kawamoto reported that PayPal received 6 percent of its revenue from online gambling, according to its filing with the Securities and Exchange Commission last year.

Glasner interviewed Keith Furlong, of the Interactive Gaming Council, who said that with PayPal out of the picture, gamblers would likely turn to competing online payment services such as Neteller and Firepay. Firepay is governed under the laws of Bermuda.

Another alternative payment system being used by online gamblers and

If Internet gambling was regulated in the US, Cohen believes that Internet wagering companies would be willing to cooperate with federal regulators by helping to combat money laundering, suspected game-fixing, underage gambling and attempts by individuals to avoid paying taxes on winnings, Kanigher reported.

Countries where online gambling is legal take exception with the fact the US is attempting to outlaw it. Antigua and Barbuda recently announced their intention to bring the United States before the World Trade Organisation (WTO) over its anti-Internet gambling stance and what it sees as interference in its economic development, reported Glen Shapiro of Law And Tax-News.com in March.

Shapiro quoted Antiguan Prime Minister, Lester Bird as saying, "America is the largest gambling country in the world so how can they then be so unctuously self-righteous, to use their power to destroy the niches that we are having, trying to develop some kind of diversification in our economy. It is unfair and therefore we are going to take them before the WTO."

In March Mark Berniker of InternetNews.com reported Antigua has more than 100 licensed online casino operators, which generate millions of dollars every year for the Antiguan government. "Antigua, for its part, says that with the downturn in the tourism industry, the country has come to rely on revenues generated from licensing and taxing of online casinos on its territory. The online betting industry employs 3,000 people in Antigua, and officials say the U.S. would be in violation to its commitments under the WTO's commercial services agreement."

As was stated at the beginning of this article, the issues involved in online gambling are a lot more complicated today. Every year a different twist is added to the Internet mix and nothing ever stays the same for very long.

If you remember six years ago when

cited by the Australian Bankers' Association is the use of electronic cash or e-cash.

In March Rod Smith of The Delaware News Journal quoted gaming author Mark Schopper as saying that 'according to the Treasury Department electronic cash was "the biggest money laundering threat ever seen". Schopper said the Kyl legislation banning credit cards for online gambling would likely have "tremendous unintended consequences encouraging money laundering."

"Criminalizing online gaming, as the committee seeks to do, is a practical impossibility because operators are based offshore, beyond the reach of U.S. law, he said.... The real fly in the ointment is that the alternative payment systems being developed to get around the ban "are the most powerful and untraceable money-laundering tools ever imagined by criminals, he said."

Sen. Jon Kyl (R-Ariz) first introduced his bill, everyone was heading down under. Why? Because in Australia Internet gambling was legal.

It was seen as the place to be if you wanted to corner the market on Internet gambling. Just ask those who invested there how fast the industry can change. It's all a gamble, sometimes you win and sometimes you lose, and no body knows this better than Jay Cohen.

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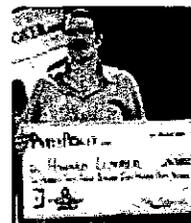
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The PartyPoker.com Million III Semi-finals took place on May 2 - 4, July 11 - 13, September 5 - 7, Nov 7 - 9 and Jan 2 - 4; [click here](#) to view the Semi-finals winners.

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300,000+ was shared by the other finalists, including 3 amateur players who qualified online! For details on 2002's dream come true, see [PartyPoker.com Million I](#).

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### ***Important Dates:***

1st Semi-finals:	May 2nd 9 pm ET	May 3rd 3 pm ET	May 4th 3 pm ET
2nd Semi-finals:	July 11th 9 pm ET	July 12th 3 pm ET	July 13th 3 pm ET
3rd Semi-finals:	Sept 5th 9 pm ET	Sept 6th 3 pm ET	Sept 7th 3 pm ET
4th Semi-finals:	Nov 7th 9 pm ET	Nov 8th 3 pm ET	Nov 9th 3 pm ET
5th Semi-finals:	Jan 2nd 2004 9 pm ET	Jan 3rd 2004 3 pm ET	Jan 4th 2004 3 pm ET
Last Semi-finals:	Feb 6th 2004 9 pm ET	Feb 7th 2004 3 pm ET	Feb 8th 2004 3 pm ET

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4. See [Extra Starting Chips](#) for more details.

[Click here](#) for more details on the PartyPoker.com Million III.

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## PartyPoker.com Million III

PartyPoker.com is proud to bring you the third annual PartyPoker.com Million. Qualifying for this World Poker Tour event has been on since March 1, 2003. The Finals will be held in March 2004 and the estimated prize pool is \$3,500,000!

### Preliminaries

1. The qualifying tournaments consist of Single-table \$25 (\$23+\$2) buy-in 'PartyPoker Million' tournaments.
2. Seating at the qualifying tournaments is on a first-come, first-serve basis. The tournament starts within seconds of 10 players being seated.
3. Win your table and advance to the Semi-finals. The 2nd and 3rd place finishers get a FREE entry into another \$25 buy-in 'PartyPoker Million' tournament.
4. You may play as many PartyPoker Million tournaments as you like and may qualify and play in up to eighteen (18) Semi-final tournaments, three (3) in each of the six sets of Semi-finals.
5. Misbehavior, collusion, and/or abuse of chat or all-in privileges will not be tolerated. Violators are subject to penalties (including disqualification).

### Semi-finals

1. The Semi-finals will be Limit Hold'em.
2. Seating will be randomly assigned.
3. Players may directly buy into each Semi-final for \$200.  
[Click here](#) to buy-in directly into the Semi-finals.
4. **Semi-finals Schedule**

#### Semi-finals Schedule for PartyPoker.com Million III

	Date	Day	Time
1st Set of Semi-finals	May 2nd 2003	Friday	9 pm ET
	May 3rd 2003	Saturday	3 pm ET
	May 4th 2003	Sunday	3 pm ET
2nd Set of Semi-finals	July 11th 2003	Friday	9 pm ET
	July 12th 2003	Saturday	3 pm ET
	July 13th 2003	Sunday	3 pm ET
3rd Set of Semi-finals	September 5th 2003	Friday	9 pm ET

	September 6th 2003	Saturday	3 pm ET
	September 7th 2003	Sunday	3 pm ET
4th Set of Semi-finals	November 7th 2003	Friday	9 pm ET
	November 8th 2003	Saturday	3 pm ET
	November 9th 2003	Sunday	3 pm ET
5th Set of Semi-finals	January 2nd 2004	Friday	9 pm ET
	January 3rd 2004	Saturday	3 pm ET
	January 4th 2004	Sunday	3 pm ET
Last Set of Semi-finals	February 6th 2004	Friday	9 pm ET
	February 7th 2004	Saturday	3 pm ET
	February 8th 2004	Sunday	3 pm ET

5. You are requested to take your seat before the tournament starts. If you are not there when the tournament starts, you will be blinded off.
6. Players may select their day(s) of play and how they wish to distribute their Extra Starting Chip by clicking on "**Options**" menu and selecting "Semi-final Calendar" option in the PartyPoker.com lobby. Players will receive a mail confirming the selection of their day(s) of play and the number of chips they will start with in each Semi-final.
7. The deadline to select a day of play and distribute your Extra Starting Chips for that day of the Semi-final is 12 hours prior to the start of the tournament (if the tournament starts at 9 pm ET 2nd May then registrations for that day will close at 9 am ET 2nd May).
8. **Extra Starting Chips:** Players may accrue Extra Starting Chips for the Semi-finals by playing Real Money games/tournaments on PartyPoker.com. **Click here** for details. To see how many Extra Starting Chips you have accrued, login to **My Account** section (website) and click Extra Starting Chips.
9. Players will start each Semi-final tournament with a base amount of \$1000 in chips and not more than \$3000, depending on the Extra Starting Chips each player has accumulated during the qualification period.
10. Extra Starting Chips for each set of Semi-finals can only be accrued during the two calendar months prior to the next scheduled date of the Semi-finals. For example, Extra Starting Chips for the Semi-finals scheduled for May 2-4 will be accrued during the period March 1 through April 30. The Extra Starting Chips have no monetary value and cannot be redeemed for cash or anything else. They are only valid for the Semi-final immediately following the period during which chips accumulated. **Click here** for more details.
11. The Semi-finals will have the Multi-table tournament format. With the exceptions noted here (such as length of time per Level and Prize Distribution), the standard Multi-table tournament rules and procedures will apply. **Click here** for more details about Standard Tournament Rules.
12. The Semi-finals will work like a Super Satellite in that as many players as possible will win a seat into the Finals. Package value of winning a Semi-final tournament = \$9000.
13. For every entry, \$180 will be in the prize pool. For every 50 entries, one seat (i.e., "Cruise Package" - which includes a cruise for two and a paid entry into the Finals) will be awarded. Any remaining monies will be paid to the next three highest finishers on a 50%, 30%, 20% ratio.
14. Players **cannot sell or transfer** their Cruise Packages to anyone. Those who win only one Semi-final or Super Satellite are required to play the Finals of the PartyPoker.com Million III. PartyPoker.com will pay **\$9,000** for any additional wins. The funds will be credited to the player's account within two days of the win. PartyPoker.com reserves the right to buy back a Cruise Package from a Player and credit the Player's account with up to \$9,000. In case PartyPoker.com decides to buy back a Cruise Package

from multi players, it will announce the criteria for such buy-back(s).

15. There are no Tournament Entry refunds for those unable to make it on the cruise.
16. **Structure:** Limits will begin at \$15/30 (Level 1) and progress as follows:

Round	Blinds	Limit
1	\$10/15	\$15/30
2	\$10/20	\$20/40
3	\$15/30	\$30/60
4	\$25/50	\$50/100
5	\$50/100	\$100/200
6	\$75/\$150	\$150/\$300
7	\$100/200	\$200/400
8	\$150/300	\$300/600
9	\$200/400	\$400/800
10	\$250/500	\$500/1000
11	\$300/600	\$600/1200
12	\$400/800	\$800/1600
13	\$500/1000	\$1000/2000
14	\$750/1500	\$1500/3000
15	\$1000/2000	\$2000/4000
16	\$1500/3000	\$3000/6000
17	\$2000/4000	\$4000/8000
18	\$2500/5000	\$5000/10000
19	\$3000/6000	\$6000/12000
20	\$4000/\$8000	\$8000/16000

17. **Time of Play:** Levels 1-9 will consist of 20 minutes each. Levels 10-20 will consist of 30 minutes each. Play will continue at Level 20 (if it goes that far) until the conclusion of the tournament.
18. **Breaks:** There will be a five (5) minute break after each hour of play.
19. If two or more players go out on the same hand, the player who started the hand with the most chips will get the higher finishing position.
20. There will be no deals sanctioned by PartyPoker.com in the Semi-finals. Anyone violating the "no deal" policy will be subject to disqualification.
21. Unethical behavior, collusion, and/or chat / all-in abuse will not be tolerated. Violators are subject to penalties, including disqualification.
22. All Semi-final winners will be contacted for details and copies of passport / drivers license etc. before the cruise. Anyone whose information does not match the information on records is liable to be barred from the Finals.

23. It is the sole responsibility of the Semi-final winners to get to the ship on time.
- 

### **PartyPoker.com Million III Finals**

The PartyPoker.com Million III will be a televised event on the World Poker Tour (WPT).

Players may enter the Finals of PartyPoker.com Million III in the following ways: Qualify online winning a Semi-final or a Super Satellite, or (if space permits) buy their way directly into the Finals for \$7500 (plus cruise costs).

Estimated Prize Pool = **\$3,500,000!!** First place = **\$1,000,000.**

#### **Details of the Finals:**

The game will be strictly Limit Hold'em.

The direct buy-ins will pay \$7500 to enter (of which \$7000 will go to the prize pool and \$500 will be the entry fee).

Players will start with \$7000 in chips and play will start at the \$100/\$200 level. Levels will be one hour each and there will be a 15-minute break after every two levels. ([Click here](#) for complete structure.)

Players will register for the tournament and draw for their seat assignments on the day they board the ship. (Saturday) Approximately half of the players will start play on Day 1 (Sunday) while the other half will start play on Day 2 (Monday). Play will consist of eight levels of play on Days 1 & 2. The remaining players will continue on Day 3 (with the amount of chips they finished the day with).

Play will continue on Day 3 for 8 levels or until play reaches 18 players (whichever comes first)

Play will continue on Day 4 until six players remain. (The final table of WPT events consists of 6 players.)

Day 5 will be the televised final and play will continue until a champion is crowned.

WPT protocol will apply at the final table (such as players must expose their hands to the camera, follow a proper dress code requirement, breaks being set for TV, etc.)

Players who "make the money" will be paid by check (or the money will be placed in your PartyPoker account if you prefer).

The tournament will be staffed by Card Player Cruises.

#### **Rules:**

All decisions made by the Rules Committee are final and not subject to appeal.

Players must be at least 21 years old to play.

Behavior penalties (including possible disqualification) will be in force for misbehavior, unethical activity, abuse of players or staff, and foul language.

The Rules Committee has the right to change or amend any rules, format, or procedures if they deem it's in the best interest of the tournament to do so.

All entrants will be required to show proof of identification (and that they are 21 years of age).

Seating will be by a random draw.

3% of the prize pool will be taken out for the tournament staff.

\$25,000 will be taken out of the prize pool for the entry into the WPT championship event at Bellagio in April 2004. [Click here](#) for complete Prize pool pay-out structure.

By participating in the PartyPoker.com Million, you grant PartyPoker.com full rights to record your identity, likeness and voice in connection with the PartyPoker.com Million event and make use of such identity, likeness and voice, in any manner as PartyPoker.com may choose, in any and all media and manner throughout the world now known or later developed, for any purpose whatsoever including (but not limited to) production, distribution, broadcast, advertising and promotion.

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**Main Identity**

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**From:** <info@partypoker.com>  
**To:** <jmkasper@amg-nd.com>  
**Sent:** Saturday, February 07, 2004 9:50 AM  
**Subject:** Important New Player Information

Dear Kabekona,

Welcome to PartyPoker.com!

It is our pleasure to have you play at our site and we hope that you enjoy your visit.

To optimize your experience, please read this email carefully, as it contains important information about your Account and some tips to ensure that you enjoy PartyPoker.com to the fullest.

1. Now that you have downloaded the Software and opened an Account, you may re-enter the system by clicking the PartyPoker.com icon on your desktop.
2. The same Account allows you to play at both the real money as well as play money tables. However, to play at the real money tables, you first need to make a real money deposit at the Cashier.
3. Our Cashier accepts Visa, MasterCard, wires, checks, eChecks, inter-account transfers and more. For a complete list of payment options and information on depositing and cashing out, see <http://www.PartyPoker.com/cashier/index.html>.
4. Each month we have lots of tournaments, giveaways, getaways and special surprise bonuses that give you lots of extra cash. To find out the latest, see our Events Calendar at <http://www.PartyPoker.com/news/index.html>.
5. Tell-A-Friend about PartyPoker.com and get \$75 for you and your friend. It's easy, just tell your friends about PartyPoker.com and when they open their Account and make their first deposit, you'll get \$50 added to your Account and they'll get \$25. Tell as many friends as you want and share the fun, and the extra poker money! See [http://www.PartyPoker.com/tell\\_a\\_friend/index.html](http://www.PartyPoker.com/tell_a_friend/index.html) for details.

PartyPoker.com was launched in August 2001 and has quickly become one of the favorite online poker sites. We serve thousands of players each day and are committed to providing you world-class service and an outstanding experience. We are licensed and regulated by the Kahnawake Gaming Commission, Quebec, Canada, and our gaming system is tested by BMM International.

If you have any questions or concerns, please do not hesitate to contact us as indicated below or via the Live Floorperson in the PartyPoker Software. Our Customer Care Department is open 24/7 and we look forward to serving you.

Sincerely Yours,

Lucy Jones

Customer Care Manager

[info@partypoker.com](mailto:info@partypoker.com)

Main Tel: +1 206 203 5004

Toll Free: +1 888 206 4659 (USA & Canada Only)

<http://www.partypoker.com>

## Main Identity

**From:** <events@pokerstars.com>  
**To:** <jmkasper@amg-nd.com>  
**Sent:** Monday, February 09, 2004 6:23 AM  
**Subject:** Tournament One Million celebration - \$500,000 in prizes plus deposit bonus!

PokerStars.com

TOURNAMENT ONE MILLION CELEBRATION

\$500,000 in prizes plus deposit bonus!

Dear PokerStars player,

It's hard to even imagine - but in the next week, PokerStars will run Tournament One Million.

We're celebrating with a series of special events to thank you, the players who got us to this amazing milestone. With over \$500,000 in prizes and a deposit bonus, we've got quite a party planned!

 **20% Deposit Bonus.**

From now until February 15th, deposit up to \$600 in your PokerStars account, and we'll give you up to \$120 in free cash! (restrictions apply - [click here](#) for details.)

 **Tourney One Million Freeroll.**

Use 500 of your Frequent Player points to enter the \$50,000 Tournament One Million Freeroll and get your share of more free money! The top 180 players (20 tables) win cash. Join us on February 15th at 2:30pm EST for this exciting event.

 **\$2 million in guaranteed tournaments.**

From February 25th through March 14th, our regular \$200 Sunday No Limit Hold'em tournaments have guaranteed prize pools of \$250,000, and the \$500 tournament on February 29th has a \$300,000 guarantee! In addition, the daily 10:15pm \$11 tourneys will have guaranteed prize pools of \$20,000.

 **\$500,000 or more in free entries to guaranteed events.**

We're giving away an estimated \$500,000 in free entries to the guaranteed events. You have two ways to win:

1. Enter the two daily multi-table tourneys (2 pm and 10 pm EST Monday-Saturday, 5 pm and 10 pm Sundays) for 500 FPPs
2. Play a 3-table Sit & Go tournament for 500 or 1,200 FPPs

2/9/04

Over 2,000 players will win free entries.

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Don't miss out on your chance to win your share of this free cash - sign on today and get your share of the Tournament One Million celebration!

**The PokerStars team**

PS: We've received many questions about satellites and freerolls for the World Poker Tour \$25,000 event at the Bellagio and about the 2004 World Series of Poker. The announcement is coming your way this week - watch your email!

This is a newsletter sent to all PokerStars.com account holders. If you wish to remove your name from our mailing list, please reply with the subject line: Remove.

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## THE PENDING DETERMINATION OF THE LEGALITY OF INTERNET GAMBLING IN THE UNITED STATES

*Internet gambling has been targeted on many fronts in the United States, including Congress, the courts, the Bush Administration and credit card agencies. This iBrief details recent trends in the regulation of online gaming, and concludes that while absolute prohibitions may be ineffective, the combined resistance of these institutions will prevent the industry from expanding its customer base.*

### An Overview

¶ 1 There can be little doubt that Internet gambling means big business around the world. Online gaming sites have won \$4.1 billion from bettors this year, and that number is expected to increase to an estimated \$6 billion next year.<sup>1</sup> Gamblers in the United States are responsible for between 50 percent and 65 percent of that amount.<sup>2</sup>

¶ 2 This iBrief will discuss four current developments that will determine the course of evolution of the Internet gambling industry:

- First, the Internet Gambling Enforcement Bill<sup>3</sup> passed last year in the United States House of Representatives.<sup>4</sup> This bill sought to prevent online gambling sites from using credit card instruments in their transactions.<sup>5</sup> The Senate never voted on the proposed legislation before the 107th Congress adjourned, so any attempt to regulate Internet gambling must begin again with the 108th Congress. Nonetheless, the House vote signaled interest by lawmakers in the issue of Internet gambling regulation.
- The second development is the move by credit card companies to prohibit the use of their cards in online gaming transactions.<sup>6</sup> This strategic move by the credit card industry was prompted by pressure from state governments.<sup>7</sup> Along with major credit card services,

online cash payment system PayPal has also announced that it will prohibit money transfers to online gambling sites, citing an uncertain regulatory environment.<sup>8</sup>

- Third, the Bush Administration has made its position known regarding the legality of Internet gambling in a letter from the Department of Justice to the Nevada Gaming Control Board, stating that "federal law prohibits gambling over the Internet, including casino-style gambling..."<sup>9</sup>
- Finally, the Second Circuit's recent decision in *United States v. Cohen*<sup>10</sup> indicates that the federal judiciary is willing to use the 1961 Wire Act<sup>11</sup> to prosecute Internet gambling sites, even when they are operated offshore.<sup>12</sup>

¶ 3 Each of these developments casts a shadow of legal uncertainty on the future of Internet gambling in the United States. While past attempts in Congress to enact anti-Internet gaming legislation have failed,<sup>13</sup> the Leach bill represents a significant stride toward achieving consensus on the issue. Despite the fact that the Senate did not vote on the bill this session, the industry is likely to be stifled by legislative means and by credit card company anti-gaming policies in the near future. Furthermore, the recent Nevada decision by the Bush administration affirms the anti-Internet gaming stance formulated by the Clinton administration in its prosecution of Jay Cohen in the 1990s.<sup>14</sup>

## Four Current Developments

### *1. The Internet Gambling Enforcement Act*

¶ 4 The Internet Gambling Enforcement Act<sup>15</sup> passed in the House of Representatives in 2002, ending a streak of several failed attempts at passing Internet gambling legislation.<sup>16</sup> Its sponsors, Rep. Jim Leach (R-Iowa) and John DeFalce (D-NY), introduced the bill in order to limit U.S. access to Internet gambling sites hosted on offshore servers. The bill aims to achieve this goal by prohibiting Internet gambling businesses from accepting credit, electronic funds transfers, checks or drafts from would-be U.S. Internet gamblers.<sup>17</sup> Additionally, the bill implicates financial institutions that may knowingly act as intermediate agents between gamblers and the Internet gaming business.<sup>18</sup>

¶ 5 Money laundering and "problem gaming" are the two reasons most often cited in support of a prohibition on Internet gambling.<sup>19</sup> Money laundering became a prime issue when Rep. Leach introduced a similar prohibition of Internet gambling that was included in early drafts of the USA Patriot Act.<sup>20</sup> In order to connect the gambling prohibition to the post-September 11th anti-terrorism legislation, Rep. Leach and his supporters

argued that Internet gambling provided a forum for terrorists to launder money.<sup>21</sup> This position was criticized when no evidence was produced to show that there was any connection between online gambling and the funding of terrorist cells, and the measure was dropped from the final draft of the USA Patriot Act.<sup>22</sup> Still, this history remains embedded in the language of the Leach Bill as an observation: "Internet gambling conducted through offshore jurisdictions has been identified by United States law enforcement officials as a significant money laundering vulnerability."<sup>23</sup>

¶ 6 Second, supporters of the bill argue that Internet gambling amplifies what is known in the industry as "problem gaming."<sup>24</sup> In brick-and-mortar gambling establishments, safeguards against gambling addiction and underage gambling have been established. Online gamblers remain anonymous and often use credit cards when placing bets. Addicted players can lose a life savings or create thousands of dollars of debt without leaving their home. The Internet Gambling Enforcement Act addresses problem gaming over the Internet by eliminating common paths where money might flow from the gambler to the Internet site.

¶ 7 Unfortunately, Rep. Leach's success in the House would have had to have been repeated in the Senate before the end of the 2002 session if the Bill were to have become law under the current Congress. Sen. Jon Kyl (R-Ariz.), had also hoped to hold a vote on a bill identical to Rep. Leach's Internet Gambling Enforcement Act. He had the support of Sen. Tim Johnson (D-S.D.), who previously introduced his own bill that would amend the 1961 Wire Act to prohibit Internet gambling.<sup>25</sup> However, with many other issues pending in the gridlocked Senate, the issue of Internet gambling was never put to a vote.

## *II. Self-Regulation in the Credit Card Industry*

¶ 8 Many of the financial institutions targeted in the Internet Gambling Enforcement Act have taken independent steps to prohibit transactions between gamblers and Internet gambling businesses.<sup>26</sup> American Express, Discover, Citibank, MasterCard, and Visa prohibit Internet gambling transactions due to the uncertain legal climate of the industry.<sup>27</sup> In addition to the liability problems, credit transaction companies claim that risks of fraud and bad debt are higher for internet gambling compared with other transactions.<sup>28</sup> In Citibank's case, the New York Attorney General, Eliot Spitzer, heavily influenced its decision. Spitzer accused the credit card company of knowingly profiting from an illegal activity. This allegation, if prosecuted, could have resulted in criminal liability under New York law. Citibank denied any wrongdoing, but agreed to contribute \$400,000 to compulsive gambler counseling services.<sup>29</sup>

¶ 9 Gamblers adapted quickly by learning to make payments through digital money services such as PayPal, a service that facilitates online

money transfers by disbursing payments between members via email. However, Spitzer also pursued PayPal after the success of its confrontation with Citibank. PayPal declared that it had already agreed to prohibit gambling transactions due to its acquisition by eBay. Still, PayPal settled with the State of New York for \$200,000 in disgorged profits.<sup>30</sup> Other online money services similar to PayPal have stepped in to fill in the void, but each prohibition adds to the frustration of online gambling and creates barriers that may prove to be too high to attract new customers. In light of this trend toward prohibition of credit card and digital money transactions, only the most die-hard gamblers will resort to the use of unregulated foreign online banks and non-Internet based forms of money transfer.

### *III. Nevada Gaming Control Board*

¶ 10 Internet gambling in the United States seemingly is under attack from all angles. In August, the Justice Department signaled its opinion in a letter to the Nevada Gaming Control Board that current federal law prohibits Internet gambling.<sup>31</sup> This statement was made in response to an inquiry by the Control Board on the legality of a rule change that would legalize Internet gambling in Nevada.<sup>32</sup> Before the Department of Justice gave its opinion, there was some uncertainty as to where the activity of online gambling actually occurred, since bettors are frequently in different jurisdictions than the websites they contact. The letter makes it clear that the Justice Department considers gambling to have occurred in both the jurisdiction of the gambler and in the jurisdiction of the gambling business.<sup>33</sup> Under this approach, gamblers in Nevada could be held liable for their activities in cyberspace even if the web server was located offshore. This interpretation of current federal law signals the executive branch's current approach to the legality of Internet gambling, reinforcing the Clinton administration's position on Internet gambling.

¶ 11 It has been noted by gaming industry leaders that the Department of Justice relies too much on the Wire Act in its determination that online gambling is against federal law.<sup>34</sup> This legislation was enacted in order to prohibit sports betting, and it remains silent on other gambling activities.<sup>35</sup> While the Wire Act may not have been drafted with the Internet in mind, the Nevada decision shows the Justice Department's willingness to enforce the spirit of the 1961 gambling legislation. If Congress has changed its policy toward telephone and Internet gambling over the last forty years, it must make its intentions clear in the form of new legislation.

### *The Cohen Case*

¶ 12 The judiciary took a strong stand against Internet gambling in the Second Circuit decision against offshore bookmaker Jay Cohen.<sup>36</sup> Cohen moved from California to the Caribbean island of Antigua to start World Sports Exchange (WSE), a sports-betting company that specifically

targeted customers in the United States through advertisements in newspapers and on television and the radio.<sup>37</sup> Cohen's business was very successful, garnering \$5.3 million in wired U.S. funds over a fifteen-month period. The FBI investigated Cohen and his venture, placing bets of its own on the World Sports Exchange system over the telephone and on the Internet from October 1997 to March 1998.<sup>38</sup> In March 1998, Cohen was arrested under the Wire Act of 1961, which makes it illegal for businesses to take bets from gamblers over telephone lines or through other wired devices.<sup>39</sup>

¶ 13 Cohen was convicted in February 2000 at a jury trial for violation of three prohibition clauses in §1084(a) of the Wire Act: "(1) transmission in interstate or foreign commerce of bets or wagers, (2) transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, (3) information assisting in the placement of bets or wagers."<sup>40</sup> He appealed this decision to the Second Circuit Court of Appeals, arguing, *inter alia*, that the jury was improperly instructed to disregard the safe-harbor provision set forth in §1084(b). In order for the safe-harbor to apply, §1084(b) requires two conditions to exist. First, the betting must be legal in both the origin and the destination of the transmission. Second, the transmission must be limited to information that merely assists in the placing of the bets.<sup>41</sup> The court found that betting was illegal in New York, and went on to discuss the transmission of a bet. Cohen argued that his system was designed so that "the transmissions between WSE and its customers contained only information that enabled WSE itself to place bets entirely from customer accounts located in Antigua."<sup>42</sup> Thus, the transmissions never involved the actual placement of bets. The court ruled that the trial court's instructions to the jury were not improper when it declared that a transmission between a bettor and WSE over the telephone or Internet to signal the placement of a bet and an affirmation that the bet was accepted constituted a transmission under §1084.<sup>43</sup> "By making those requests and have them accepted, WSE's customers were placing bets."<sup>44</sup>

¶ 14 The court's decision sends a strong message to the Internet gambling industry: when determining whether a gambling transmission took place, the Second Circuit will pierce through mechanical means of placing bets such as the Internet to prevent the safe-harbor for "assisting information" from applying. Opponents of this opinion might note that the court's interpretation on this point may be dicta. After all, the court had already ruled that gambling was illegal in New York, so it did not need to address the transmission portion of the safe-harbor subsection to show that it did not apply. Nonetheless, the court has made its intentions clear, and in the absence of other case law on the matter, all offshore Internet gambling businesses should be on notice that they may be criminally liable if they accept bets transmitted from within the U.S. Finally, it should be noted that this decision involved sports betting only. As discussed above, it is not clear that the Wire Act applies to other forms of gambling.

## Conclusions

¶ 15 Though the underlying reasons for the multi-faceted resistance to Internet gambling lie outside the scope of this iBrief, the future effects of such opposition on the industry are easy to predict. Gambling sites will continue to operate offshore, but may refuse to take bets from gamblers located in the United States. Committed gamblers in the United States will maintain bank accounts in foreign countries and only associate with businesses well outside the grasp of American jurisdiction. In the end, the protectionist measures described above may never completely put a halt to Internet gambling in the United States. However, the actions of Congress, the Bush Administration, and the courts may very well achieve success in preventing the spread of casual gambling, underage gambling, and credit-based gambling that have proliferated since the growth of the World Wide Web.

¶ 16 The resulting curtailment of Internet gambling shifts the balance between individual freedom so often associated with the Internet and government paternalism. On one hand, Internet gambling has allowed an individual to make informed decisions regarding personal monetary resources. In contrast, the recent trend toward Internet gambling opposition suggests that gambling has not shaken its reputation as a stigmatized activity, subject to the prohibition by the government authorities, regardless of the manner in which the transactions are executed. The current situation splits the difference: government leaders are simply maintaining the status quo of the role of gambling in the context of society. Before the Internet, gambling was a tolerated activity in a highly regulated sector of the economy. The Internet opened the floodgates on the ability of gambling to thrive as an industry, and frustrated the intent of antiquated legislation designed to confine gambling activity to a narrow domain. Now that the glow of the new technology of the Internet has faded, the government is in the process of returning gambling to its regulated corner of the economy.

**By: Gregory Manter**

## Footnotes

1. Jeff Simpson, *Online Gaming Decision Panned: Official Deems Net Bets Illegal In Letter*, Las Vegas Rev.-J., Sept. 4, 2002, at [http://www.lvrj.com/lvrj\\_home/2002/Sep-04-Wed-2002/business/19556668.html](http://www.lvrj.com/lvrj_home/2002/Sep-04-Wed-2002/business/19556668.html).

2. *Id.*

3. H.R. 556, 107th Cong. (2002).

4. *House Passes Leach Bill*, Gaming Mag., Oct. 2, 2002, at <http://www.gamingmagazine.com/managearticle.asp?c=390&a=693>.

5. Pamela Barnett, *E-Commerce: Arney Urged to Act on Compromise Internet Gambling Bill*, Nat'l J.'s Tech. Daily, PM Ed., Sept. 4, 2002.
6. Linda Punch, *Are All Bets Off for Online Gambling?*, 15 Credit Card Mgmt., Merchant Acquiring, No. 6, at 14.
7. *Id.*
8. *Id.*
9. *E-Commerce*, Nat'l J.'s Tech. Daily, PM Ed., Sept. 10, 2002. ("In an Aug. 23 letter, Michael Chertoff, assistant attorney general and head of Justice's criminal division, responded to inquiries from Nevada Gaming Control Board Chairman Dennis Neilander, listing federal statutes that prohibit online gaming activity.")
10. *United States v. Cohen*, 260 F.3d 68 (2nd Cir. 2001).
11. Wire Act, 18 U.S.C. §1084 (1961).
12. *Cohen*, 260 F.3d at 278.
13. Maureen Sirhal, *Outlook: E-Gambling: GOP House Bills Have a Chance*, Nat'l J.'s Tech. Daily, PM Ed., Aug. 22, 2002.
14. Simpson, *supra* note 1.
15. H.R. 556, 107th Cong. (2002).
16. Sirhal, *supra* note 13.
17. H.R. 556, 107th Cong. §3 (2002).
18. *Id.* §3(e).
19. Punch, *supra* note 6, at 14.
20. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).
21. Frank J. Fahrenkopf, Jr., *State of the Gaming Industry*, Am. Gaming Assoc., Dec. 11, 2001, at [http://www.americangaming.org/media\\_update/speeches/speech.cfm/id/33](http://www.americangaming.org/media_update/speeches/speech.cfm/id/33).
22. *Id.*
23. H.R. 556, 107th Cong. §2(4) (2002).

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26. Punch, *supra* note 6, at 14.

27. *Id.*

28. *Id.*

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30. *States*, Wash. Internet Daily, Aug. 22, 2002.

31. *E-Commerce*, Nat'l J.'s Tech. Daily, PM Ed., Sept. 10, 2002.

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33. *Id.*

34. Simpson, *supra* note 1.

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37. *Id.* at 70.

38. *Id.* at 71.

39. *Id.*

40. *Id.* (citing 18 U.S.C. §1084(a)).

41. *Id.* at 73.

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43. *Id.* at 74-75.

44. *Id.* at 75.

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**History**

(Showing 9 documents)

**Direct History**

- 1 **U.S. v. Cohen**, 260 F.3d 68 (2nd Cir.(N.Y.) Jul 31, 2001) (NO. 00-1574)  
*Certiorari Denied by*
- 2 Cohen v. U.S., 536 U.S. 922, 122 S.Ct. 2587, 153 L.Ed.2d 777, 70 USLW 3562, 70 USLW 3769, 70 USLW 3774 (U.S. Jun 17, 2002) (NO. 01-1234)

**Court Documents****Appellate Court Documents (U.S.A.)**

- 3 Jay COHEN, Petitioner, v. UNITED STATES, Respondent., 2002 WL 32136041 (Appellate Filing) (U.S. Feb. 22, 2002) Petition for a Writ of Certiorari (NO. 01-1234)
- 4 Jay COHEN, Petitioner, v. UNITED STATES, Respondent., 2002 WL 32136044 (Appellate Filing) (U.S. Apr. 12, 2002) Brief of the International Financial Sector Regulatory Authority, an Administrative Agency of the Go (NO. 01-1234)
- Jay COHEN, Petitioner, v. UNITED STATES OF AMERICA., 2002 WL 32136048 (Appellate Filing) (U.S. May. 15, 2002) Brief for the United States in Opposition (NO. 01-1234)
- 6 Jay COHEN, Petitioner, v. UNITED STATES, Respondent., 2002 WL 32136049 (Appellate Filing) (U.S. May. 23, 2002) Reply Brief (NO. 01-1234)
- 7 UNITED STATES OF AMERICA, Appellee, v. Jay COHEN, Defendant-Appellant., 2000 WL 33980802 (Appellate Brief) (C.A.2 Nov. 22, 2000) Appellant's Brief (NO. 00-1574)  
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- 8 UNITED STATES OF AMERICA, Appellee, v. Jay COHEN, Defendant-Appellant., 2001 WL 34093080 (Appellate Brief) (C.A.2 Jan. 25, 2001) Brief for the United States of America (NO. 00-1574)  
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- 9 UNITED STATES OF AMERICA, Appellee, v. Jay COHEN, Defendant-Appellant., 2001 WL 34091652 (Appellate Brief) (C.A.2 Mar. 14, 2001) Appellant's Reply Brief (NO. 00-1574)  
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## U.S. 2nd Circuit Court of Appeals

### USA v COHEN

UNITED STATES COURT OF APPEALS

THE SECOND CIRCUIT

August Term, 2000

Argued: May 21, 2001 Decided: July 31, 2001 )

Docket No. 00-1574

UNITED STATES OF AMERICA,

Appellee, v.

JAY COHEN, Defendant-Appellant.

Before:

LEVAL and PARKER, *Circuit Judges*,

and KEENAN,\* *District Judge*.

---

Appellant from a judgment of the United States District Court for the Southern District of New York (Griesa, J.) after a trial jury convicted the defendant Jay Cohen of conspiracy and substantive violations under the Wire Wager Act, 18 U.S.C. § 1084.

Affirmed. \_\_\_\_\_

JOSEPH V. DEMARCO, Assistant United States Attorney for Mary Jo White, United States Attorney for the Southern District of New York (Assistant United States Attorney George S. Canellos, New York, NY, on the brief), for Appellee.

MARK M. BAKER, New York, NY (Brafman & Ross, P.C., Benjamin Brafman, Jennifer Liang, and Melinda Sarafa on the brief) for Defendant-Appellant.

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KEENAN, District Judge:

**BACKGROUND** In 1996, the Defendant, Jay Cohen ("Cohen") was young, bright, and enjoyed a lucrative position at Group One, a San Francisco firm that traded in options and derivatives. That was not all to last, for by 1996 the Internet revolution was in the speed lane. Inspired by the new technology and its potential, Cohen decided to pursue the dream of owning his own e-business. By year's end he had left his job at Group One, moved to the Caribbean island of Antigua, and had become a bookmaker. Cohen, as President, and his partners, all American citizens, dubbed their new venture the World Sports Exchange ("WSE"). WSE's sole business involved bookmaking on American sports events, and was purportedly patterned after New York's Off-Track Betting Corporation.<sup>2</sup> WSE targeted customers in the United States, advertising its business throughout America by radio, newspaper, and television. Its advertisements invited customers to bet with WSE either by toll-free telephone or by internet.

WSE operated an "account-wagering" system. It required that its new customers first open an account with WSE and wire at least \$300 into that account in Antigua. A customer seeking to bet would then contact WSE either by telephone or internet to request a particular bet. WSE would issue an immediate, automatic acceptance and confirmation of that bet, and would maintain the bet from that customer's account.

In one fifteen-month period, WSE collected approximately \$5.3 million in funds wired from customers in the United States. In addition, WSE would typically retain a "vig" or commission of 10% on each bet. Cohen boasted that in its first year of operation, WSE had already attracted nearly 1,600 customers. By November 1998, WSE had received 60,000 phone calls from customers in the United States, including over 6,100 from New York.

In the course of an FBI investigation of offshore bookmakers, FBI agents in New York contacted

WSE by telephone and internet numerous times between October 1997 and March 1998 to open accounts and place bets. Cohen was arrested in March 1998 under an eight-count indictment charging him with conspiracy and substantive offenses in violation of 18 U.S.C. § 1084 ("§ 1084"). That statute reads as follows:

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

§ 1084(a)-(b). In the conspiracy count (Count One) and in five of the seven substantive counts (Counts Three through Six, and Eight), Cohen was charged with violating all three prohibitive clauses of § 1084(a) ((1) transmission in interstate or foreign commerce of bets or wagers, (2) transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, (3) information assisting in the placement of bets or wagers). In two counts, Counts Two and Seven, he was charged only with transmitting "information assisting in the placing of bets or wagers."

Cohen was convicted on all eight counts on February 28, 2000 after a ten-day jury trial before Judge Thomas P. Griesa. The jury found in special interrogatories that Cohen had violated all three prohibitive clauses of § 1084(a) with respect to the five counts in which those violations were charged. Judge Griesa sentenced Cohen on August 10, 2000 to a term of twenty-one months' imprisonment. He has remained on bail pending the outcome of this appeal.

**DISCUSSION** On appeal, Cohen asks this Court to consider the following six issues: (1) whether the Government was required to prove a "corrupt motive" in connection with the conspiracy in this case; (2) whether the district court properly instructed the jury to disregard the safe-harbor provision contained in § 1084(b); (3) whether Cohen "knowingly" violated § 1084; (4) whether the rule of lenity requires a reversal of Cohen's convictions; (5) whether the district court constructively amended Cohen's indictment in giving its jury instructions; and (6) whether the district court abused its discretion by denying Cohen's request to depose a foreign witness. We will address those issues in that order.

## I Corrupt Motive

● appeals his conspiracy conviction on the grounds that the district court instructed the jury to disregard his alleged good-faith belief about the legality of his conduct. He argues that People v. Powell, 63 N.Y. 88 (1875), requires proof of a corrupt motive for any conspiracy to commit an offense that is malum prohibitum, rather than malum in se. We disagree, and we hold that whatever remains of Powell does not apply to this case.

In 1875, the New York Court of Appeals ruled in Powell that a conspiracy to commit an offense that was "innocent in itself" required evidence of a "corrupt" or "evil purpose." Id. at 92. The Powell defendants were commissioners of charities for Kings County and had been convicted of conspiring to violate state law by purchasing supplies without first advertising for proposals and awarding a contract to the lowest bidder. Id. at 89-90.

The Powell Court upheld an appellate court's reversal of the trial court, which had ruled that ignorance of the law was no defense to conspiracy. Id. at 89. In doing so, the Court concluded that a conspiracy offense, by nature, required some form of corrupt motive, even if its underlying substantive offense required only an intent to commit the prohibited act. Id. at 92. The Court stated that "[p]ersons who agree to do an act innocent in itself, in good faith and without the use of criminal means, are not converted into conspirators [] because it turns out that the contemplated act was prohibited by statute." Id.

● Powell doctrine was echoed in federal cases from the first half of the last century, but many circuits have since, in effect, moved away from the doctrine. Compare, e.g., Landen v. United States, 299 F. 75 (6th Cir. 1924) (applying Powell to drug wholesalers' conspiracy to sell intoxicating liquor for nonbeverage purposes without the necessary permit), with United States v. Blair, 54 F.3d 639 (10th Cir. 1995) (involving, as does this case, offshore bookmaking in violation of § 1084); United States v. Murray, 928 F.2d 1242 (1st Cir. 1991) (involving an illegal gambling business in violation of 18 U.S.C. § 1955); United States v. Thomas, 887 F.2d 1341 (9th Cir. 1989) (involving trafficking in wildlife that the defendant should have known was taken in violation of state law).

Although this Court has long expressed its discontent with the Powell doctrine, we have done so in dicta in cases involving conspiracies to commit acts that were not "innocent in themselves." See, e.g., United States v. Mack, 112 F.2d 290, 292 (2d Cir. 1940). In Mack, Judge Learned Hand criticized the Powell doctrine as "anomalous" and questioned "why more proof should be necessary than that the parties had in contemplation all the elements of the crime they are charged with conspiracy to commit." Id. He nevertheless found "'corrupt motive' in abundance" in connection with the defendant's conspiracy to employ unregistered alien prostitutes. Id.; see also United States v. Eisenberg, 596 F.2d 522, 526 (2d Cir. 1979) ("It being clearly established that requisite knowledge was proved for conviction of the substantive offense, it now follows that the ● knowledge is enough as well to establish the conspiracy to commit the substantive offense."); Hamburg-American Steam Packet Co. v. United States, 250 F. 747, 759 (2d Cir. 1918) ("[W]e are satisfied that as to the crime of conspiracy, . . . it is not necessary to show that the

defendants who are alleged to have conspired to do an act which is only malum prohibitum had knowledge of the unlawfulness of the act.")

The American Law Institute has expressly rejected Powell in its commentary to the Model Penal Code. See Model Penal Code § 5.03 note on subsec. 1 & cmt. 2(c)(iii) (1985). The Institute noted that the "melodramatic and sinister view of conspiracy" upon which Powell was premised is no longer valid. Id. at cmt. 2(c)(iii). It further observed that Powell now has "little resolving power in particular cases" and instead "serves mainly to divert attention from clear analysis of the mens rea requirements of conspiracy." Id.

In the Institute's view, the Powell doctrine was essentially "a judicial endeavor to import fair mens rea requirements into statutes creating regulatory offenses that do not rest on traditional concepts of personal fault and culpability." See id. The Institute itself disagreed with that policy, however, concluding that it was a function better left to the statutes themselves. Id.

In United States v. Feola, 420 U.S. 671 (1975), the Supreme Court, in another context, rejected the notion that a federal conspiracy conviction required proof of scienter. We conclude that the Powell doctrine does not apply to a conspiracy to violate 18 U.S.C. § 1084.

## **II The Safe Harbor Provision**

Cohen appeals the district court for instructing the jury to disregard the safe-harbor provision contained in § 1084(b). That subsection provides a safe harbor for transmissions that occur under both of the following two conditions: (1) betting is legal in both the place of origin and the destination of the transmission; and (2) the transmission is limited to mere information that assists in the placing of bets, as opposed to including the bets themselves. See § 1084(b).

The district court ruled as a matter of law that the safe-harbor provision did not apply because neither of the two conditions existed in the case of WSE's transmissions. Cohen disputes that ruling and argues that both conditions did, in fact, exist. He argues that betting is not only legal in Antigua, it is also "legal" in New York for the purposes of § 1084. He also argues that all of WSE's transmissions were limited to mere information assisting in the placing of bets. We agree with the district court's rulings on both issues.

### **A. "Legal" Betting**

There can be no dispute that betting is illegal in New York. New York has expressly prohibited betting in both its Constitution, see N.Y. Const. art. I, § 9 ("no . . . bookmaking, or any other kind of gambling [with certain exceptions pertaining to lotteries and horseracing] shall hereafter be authorized or allowed within this state"), and its General Obligations Law, see N.Y. Gen. Oblig. L. § 5-401 ("[a]ll wagers, bets or stakes, made to depend on any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, shall be unlawful"); see also Cohen v. Iuzzini, 270 N.Y.S.2d 278, 279 (App. Div. 1966) (ruling that the predecessor statute to N.Y. Gen. Oblig. L. § 5-401 (N.Y. Penal L. § 991) did not apply to bets

executed at recognized pari-mutuel tracks). Nevertheless, Cohen argues that Congress intended for the safe-harbor provision in § 1084(b) to exclude only those transmissions sent to or from jurisdictions in which betting was a crime. Cohen concludes that because the placing of bets is not a crime in New York, it is "legal" for the purposes of § 1084(b).

By its plain terms, the safe-harbor provision requires that betting be "legal," i.e., permitted by law, in both jurisdictions. See § 1084(b); see also *Black's Law Dictionary* 902 (7th ed. 1999); *Webster's 3d New Int'l Dictionary* 1290 (1993). The plain meaning of a statute "should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (alteration and internal quotation marks omitted). This is not the rare case.

Although, as Cohen notes, the First Circuit has stated that Congress "did not intend [for § 1084] to criminalize acts that neither the affected states nor Congress itself deemed criminal in nature," it did not do so in the context of a § 1084 prosecution. See *Sterling Suffolk Racecourse Ltd. P'ship v. Burrillville Racing Ass'n*, 989 F.2d 1266, 1273 (1st Cir. 1993). Instead, that case involved a private bid for an injunction under RICO (18 U.S.C. § 1961 *et seq.*) and the Interstate Horseracing Act (15 U.S.C. §§ 3001-07) ("IHA"). *Id.* at 1272-73. It does not stand for the proposition that § 1084 permits betting that is illegal as long as it is not criminal.

In *Sterling*, the defendant was an OTB office in Rhode Island that accepted bets on horse races from distant tracks and broadcasted the races. *Id.* at 1267. The office typically obtained the various consents required under the IHA, i.e., from the host track, the host racing commission, and its own racing commission. *Id.* However, it would often neglect to secure the consent of the plaintiff, a live horse-racing track located within the statutory sixty-mile radius from the OTB office. *Id.* at 1268. The plaintiff sought an injunction against the OTB office under RICO, alleging that it was engaged in a pattern of racketeering activity by violating § 1084 through its noncompliance with the IHA. *Id.*

The *Sterling* court affirmed the district court's denial of the RICO injunction. *Id.* at 1273. It noted first that because the OTB office's business was legitimate under all applicable state laws, it fell under the safe-harbor provision in § 1084(b). *Id.* Furthermore, the court held that in enacting the IHA, Congress had only created a private right of action for damages on the part of certain parties; it did not intend for any Government enforcement of the IHA. *Id.* Consequently, the plaintiff could not use the IHA together with § 1084 to transform an otherwise legal OTB business into a criminal racketeering enterprise. *Id.*

Neither *Sterling* nor the legislative history behind § 1084 demonstrates that Congress intended for § 1084(b) to mean anything other than what it says.<sup>3</sup> Betting is illegal in New York, and thus the safe-harbor provision in § 1084(b) cannot not apply in Cohen's case as a matter of law. As a result, the district court was not in error when it instructed the jury to disregard that provision.

## **B. Transmission of a Bet, Per Se**

Cohen appeals the district court's instructions to the jury regarding what constitutes a bet per se. Cohen argues that under WSE's account-wagering system, the transmissions between WSE and its customers contained only information that enabled WSE itself to place bets entirely from customer accounts located in Antigua. He argues that this fact was precluded by the district court's instructions. We find no error in those instructions.

Judge Griesa repeatedly charged the jury as follows:

If there was a telephone call or an internet transmission between New York and [WSE] in Antigua, and if a person in New York said or signaled that he or she wanted to place a specified bet, and if a person on an internet device or a telephone said or signaled that the bet was accepted, this was the transmission of a bet within the meaning of Section 1084. Congress clearly did not intend to have this statute be made inapplicable because the party in a foreign gambling business deemed or construed the transmission as only starting with an employee in an internet mechanism located on the premises in the foreign country.

Jury instructions are not improper simply because they resemble the conduct alleged to have occurred in a given case; nor were they improper in this case. It was the Government's burden in this case to prove that someone in New York signaled an offer to place a particular bet and that someone at WSE signaled an acceptance of that offer. The jury concluded that the Government carried that burden.

Most of the cases that Cohen cites in support of the proposition that WSE did not transmit any bets involved problems pertaining either to proof of the acceptance of transmitted bets, see United States v. Truesdale, 152 F.3d 443 (5th Cir. 1998), McQuesten v. Steinmetz, 58 A. 876 (N.H. 1904), Lescallett v. Commonwealth, 17 S.E. 546 (Va. 1893), or to proof of the locus of a betting business for taxation purposes, see Saratoga Harness Racing, Inc. v. City of Saratoga Springs, 55 A.D.2d 295 (App. Div. 1976).

No such problems existed in this case. This case was never about taxation, and there can be no dispute regarding WSE's acceptance of customers' bet requests. For example, a March 18, 1998 conversation between Spencer Hanson, a WSE employee, and a New York-based undercover FBI agent occurred as follows:

Agent: Can I place a bet right now?

Hanson: You can place a bet right now.

Agent: Alright, can you give me the line on the um Penn State/Georgia Tech game, it's the NIT [T]hird Round game tonight.

Hanson: Its [sic] Georgia Tech minus 7½, total is 147.

Agent: Georgia [T]ech minus 7½, umm I wanna take Georgia Tech. Can I take `em for 50?

Hanson: Sure.

WSE could only book the bets that its customers requested and authorized it to book. By making those requests and having them accepted, WSE's customers were placing bets. So long as the customers' accounts were in good standing, WSE accepted those bets as a matter of course.

Moreover, the issue is immaterial in light of the fact that betting is illegal in New York. Section 1084(a) prohibits the transmission of information assisting in the placing of bets as well as the transmission of bets themselves. This issue, therefore, pertains only to the applicability of § 1084 (b)'s safe-harbor provision. As we have noted, that safe harbor excludes not only the transmission of bets, but also the transmission of betting information to or from a jurisdiction in which betting is illegal. As a result, that provision is inapplicable here even if WSE had only ever transmitted betting information.

### III Cohen's Mens Rea

Cohen appeals the district court's instruction to the jury regarding the requisite mens rea under § 1084. Section 1084 prohibits the "knowing" transmission of bets or information assisting in the placing of bets. See § 1084(a). The district court instructed the jurors that to convict, they needed to find that Cohen "knew that the deeds described in the statute as being prohibited were being done," and that a misinterpretation of the law, like ignorance of the law, was no excuse.

Cohen argues that he lacked the requisite mens rea because (1) he did not "knowingly" transmit bets, and (2) he did not transmit information assisting in the placing of bets or wagers to or from a jurisdiction in which he "knew" betting was illegal. He contends that in giving its jury charge, the district court improperly instructed the jury to disregard that argument.

The district court was correct; it mattered only that Cohen knowingly committed the deeds forbidden by § 1084, not that he intended to violate the statute. See Bryan v. United States, 524 U.S. 184, 193 (1998). Cohen's own interpretation regarding what constituted a bet was irrelevant to the issue of his mens rea under § 1084.

In any event, Cohen is culpable under § 1084(a) by admitting that he knowingly transmitted information assisting in the placing of bets. His beliefs regarding the legality of betting in New York are immaterial. The legality of betting in a relevant jurisdiction pertains only to § 1084(b)'s safe-harbor provision. As we have already discussed, that safe-harbor provision, as a matter of law, does not apply in this case. IV Rule of Lenity

Cohen argues that the rule of lenity, a concept grounded in due process, requires a reversal of his convictions. According to Cohen, § 1084 is too unclear to provide fair warning of what conduct it prohibits. In particular, he contends that the statute does not provide fair warning with respect to (1) whether the phrase "bet or wager" includes account wagering, (2) whether "transmission"

includes the receiving of information as well as the sending of it, and (3) whether betting must be legal or merely non-criminal in a particular jurisdiction in order to be considered "legal" in that jurisdiction. None of these contentions has any merit.

The rule of lenity applies where there exists a "grievous ambiguity" in a statute, see Huddleston v. United States, 415 U.S. 814, 831 (1974), such that "after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended." Reno v. Koray, 515 U.S. 50, 65 (1995) (internal quotation marks and citation omitted). The rule exists to prevent courts from "applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." United States v. Lanier, 520 U.S. 259, 266-67 (1997).

We need not guess whether the provisions of § 1084 apply to Cohen's conduct because it is clear that they do. First, account-wagering is wagering nonetheless; a customer requests a particular bet with WSE by telephone or internet and WSE accepts that bet. WSE's requirement that its customers maintain fully-funded accounts does not obscure that fact.

Second, Cohen established two forms of wire facilities, internet and telephone, which he marketed to the public for the express purpose of transmitting bets and betting information. Cohen subsequently received such transmissions from customers, and, in turn, sent such transmissions back to those customers in various forms, including in the form of acceptances and confirmations. No matter what spin he puts on "transmission," his conduct violated the statute.

Third, it is clear to lawyer and layman alike that an act must be permitted by law in order for it to be legal. See Black's Law Dictionary 902 (7<sup>th</sup> ed. 1999); Webster's 3d New Int'l Dictionary 1290 (1993). It is also clear that betting is not permitted under New York law. See N.Y. Const. Art. I, § 9(1); N.Y. Gen. Oblig. L. § 5-401. Where a state's statute declares an act to be "unlawful," see N.Y. Gen. Oblig. L. § 5-401 ("all wagers . . . shall be unlawful"), that act is not "legal," see § 1084 (b). The safe-harbor provision is unambiguous, and is not applicable in Cohen's case.

### V Aiding-and-Abetting Liability

Cohen contends that the district court constructively amended his indictment by instructing the jury on criminal aiding-and-abetting liability under 18 U.S.C. § 2(b) rather than under § 2(a) of that title. Cohen argues that as a result, the district court failed to instruct the jury that before convicting Cohen for aiding and abetting his subordinates' conduct, it must find that those subordinates were themselves guilty of crimes. Cohen also argues that he could not have been liable under § 2 for acts committed after his arrest. We find no error in either instance.

A constructive amendment can occur when jury instructions change an essential element of the charges in the indictment so as to "deprive a defendant of an opportunity to meet the prosecutor's case." See United States v. Helmsley, 941 F.2d 71, 90 (2d Cir. 1991). (concluding that "the indictment and the jury charge . . . comported with one another in all essential respects, and [the defendant] had adequate notice of the conduct she was called upon to defend").

The district court indicated to the parties at the charging conference that it would only charge aiding-and-abetting liability under § 2(a). Section 2(a) requires proof that someone other than the defendant committed the underlying crime. See United States v. Smith, 198 F.3d 377, 383 (2d Cir. 1999).

Instead, the district court charged the jury under § 2(b), which requires only that the defendant willfully cause another person to commit an act which would have been a crime had the defendant committed it himself. See 18 U.S.C. § 2(b); United States v. Concepcion, 983 F.2d 369, 383-84 (2d Cir. 1993). Section 2(b), unlike § 2(a), does not require proof that someone else committed a crime.

Despite having charged § 2(b) rather than § 2(a), the district court did not amend Cohen's indictment. Cohen was charged in his indictment with violations of 18 U.S.C. § 2, see A15, and the district court gave the jury a proper instruction under that statute. Although there may have been some confusing colloquy between the district court and counsel prior to the jury charge, the charge was consistent with the indictment. There was no amendment.

Furthermore, Cohen could still have been liable for aiding and abetting the acts charged in Counts Seven and Eight of his indictment, even though those counts pertained to transmissions that occurred after his arrest. Cohen was a moving force behind WSE's entire operation, which continued to function after his arrest. Cohen retained his position as President of WSE while on [redacted] after his arrest.

Although Cohen purportedly did not "deal with daily operations" at WSE after his arrest, he also made no effort to curtail those operations. In fact, he benefitted from them by receiving a salary, his travel expenses, and his legal fees from WSE. He clearly was still in a position to cause others, willfully, to commit acts that would have been crimes had he himself committed them. He could, therefore, have been found liable for aiding and abetting WSE's ongoing violation of § 1084.

## VI Deposition of a Foreign Witness

Cohen argues that the district court should have granted his motion, pursuant to Fed. R. Crim. P. 15(a), to adjourn his trial for one week so that he could depose a witness in Antigua. The witness, an Antiguan government official, was unavailable for trial due to medical reasons. That testimony, however, was not material to Cohen's trial, and thus the district court did not abuse its discretion in denying the motion.

Under Rule 15(a), a trial court may, in its discretion, order the deposition of a witness for use at trial "[w]henever due to exceptional circumstances of the case it is in the interests of justice." Fed. R. Crim. P. 15(a). A movant must show that (1) the prospective witness is unavailable for trial, (2) the witness' testimony is material, and (3) the testimony is necessary to prevent a failure of justice. See United States v. Singleton, 460 F.2d 1148, 1154 (2d Cir. 1972).

Cohen states that the witness' testimony was material to two issues at his trial: (1) whether Cohen

had a corrupt motive; and (2) whether Cohen believed that he was transmitting mere information assisting in the placing of bets rather than any bets themselves. Cohen states that the witness [REDACTED] have testified to the advice she gave him based upon her experience as an Antiguan official and upon her alleged conversations with U.S. Government officials.

As this Court has already discussed, neither of these two issues was relevant to the question of Cohen's guilt under § 1084. Cohen's purported motive was irrelevant to the issue of his conspiracy conviction, or to any other issue in his case. See supra, part I. His beliefs regarding the nature of WSE's transmissions were equally irrelevant in view of the fact that § 1084(b)'s safe harbor was, as a matter of law, inapplicable to him. See supra, part II. Therefore, the district court was well within its discretion in denying the motion.

**CONCLUSION** For the reasons set forth above, the judgment of the district court is AFFIRMED.

## FOOTNOTES

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[\*]

The Honorable John F. Keenan, United States District Judge for the Southern District of New York, sitting by designation.

[2]

We note, however, that the Off-Track Betting Corporation's business is limited to taking bets on horseracing, not other sporting events.

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[3]

In support of his Congressional intent argument, Cohen offers two passages from the Congressional Reports, neither of which is persuasive. Together, the two passages evidence an intent to assist the states in enforcing gambling "offenses" and in suppressing "organized gambling activities" without preempting the states' own prosecutions of those offenses. Compare H.R. Rep. No. 87-967 (1961), reprinted in 1961 U.S.C.C.A.N 2631, 2631, with id. at 2633. Those passages do not demonstrate an intent to exclude illegal yet non-criminal gambling activity from the statute's purview.

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August 2003

**lenient plea bargain accepted**

Here's an interesting US legal development - a story from the States on an online gambler who has been successfully prosecuted.

ForumComm.com reports that a former Harwood, North Dakota man who pleaded guilty this week in Cass County District Court to placing sports bets over the Internet is believed to be the first person in the United States to be convicted of the crime.

Jeffrey Trauman, a former car salesman who began betting full time three years ago, authorized Fargo attorney John Goff to plead guilty to a misdemeanor gambling charge. Trauman now lives with his wife and three children in Kentucky, where he can legally continue his betting career, Goff said.

Though about half the states still have laws against gambling, only a handful of people have been convicted solely for placing bets, said I. Nelson Rose, a professor at Whittier Law School in California, who has studied gambling law for 23 years.

"He is the first and only person I know of who has actually both been arrested and convicted for online gambling," said Rose, whom Trauman e-mailed for advice.

Following a joint recommendation by Goff and a state prosecutor, East Central Judicial District Judge Norman Backes gave Trauman a one-year deferred sentence and a mandatory \$500 fine.

Although Trauman declared his winnings for tax purposes, a state investigation initiated by the attorney general's office began looking into his betting affairs this spring. When agents searched his home in April, they found \$43,000 in cash in a basement office. But Trauman said he did not know what he was doing was illegal and pointed out that he had declared his winnings to the tax authorities, a report by Gaming Division Auditor Greg Schlosser said.

A spokeswoman for Schlosser said a tip from an outside source led to the investigation but would not be more specific. Any further details might jeopardize future cases, she said.

Though Trauman listed professional gambler as his job on tax returns, Rose said it is highly unlikely that IRS agents tipped off investigators. U.S. Supreme Court rulings against self-incrimination restrict such collaboration.

After receiving his client's sentence Monday, Goff said the case could have made an interesting trial. The state's jurisdiction over online bets to offshore casinos is not clear, Goff said, and an argument could be made that there is none.

A trial would have probably garnered strong public support for Trauman and reflected unfavorably upon the state, Rose said. With tribal casinos, horse racing, charity gambling in bars and an upcoming lottery, North Dakota sanctions more forms of gambling than Nevada.

"Publicly, there's the whole hypocrisy argument," Rose said.

While the crime is often not prosecuted, Trauman's case stood out because of the amount he was wagering, said Assistant Cass County State's Attorney Bud Myers. State law makes any bet over \$500 a misdemeanor offense.

"He went a little beyond that," Myers said.

Rose, who plans to discuss Trauman's case in an upcoming book, "Gambling and the Law," said the Cass County conviction shouldn't worry others who bet online.

"I guess now we have one in the United States out of at least 100 million people who are gambling illegally," Rose said. "So the odds are you're not going to get in trouble."

**FINED FOR INTERNET GAMING**

's an interesting article from the LV Sun:

*FARGO, N.D. -- A former Harwood man has pleaded guilty to placing sports bets over the Internet, in what one gambling law specialist says is a rare case.*

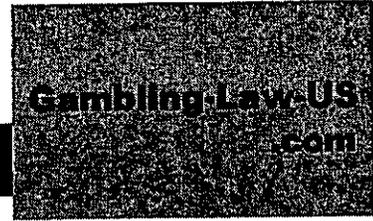
*Jeffrey Trauman pleaded guilty to the misdemeanor charge in East Central District Court in Fargo on Monday. Ju Norman Backes gave him a one-year deferred sentence and fined him \$500.*

*I. Nelson Rose, a professor at Whittier Law School in California who has studied gambling law for 23 years, said half the states still have laws against gambling.*

*The North Dakota attorney general's office said it began investigating Trauman last spring, after receiving a tip.*

Your neighbor annoys you by blasting crappy music late at night? Give your state AG's office a tip that he's an c gambler. Apparently, they've got time to investigate and charge this offense in North Dakota.

This is a reminder that, whoever has the jurisdiction over internet gaming, the situation at the state level is less clear. It all depends on the question of where the gaming transaction takes place--where the bettor is, where th is, or both places. Stuff like this gives me a headache, which is probably why I report on cases like this and don as a lawyer prosecuting or defending them.



# State Law Summary Chart

See: [Explanation of Column Headings](#)

Gambling Law US			Skill Disregarded	Social Gambling Allowed	Penalty for Simple Gambling	Penalty for Aggravated Gambling	Express Internet Prohibition	
Articles & Notes	State							
	Alabama		Yes	Yes	Misdemeanor	Misdemeanor	No	
	Alaska		Yes	Yes	Misdemeanor	Felony	No	
State Laws	Arizona		Yes	Yes	Misdemeanor	Felony	No	
	Arkansas		Yes	No	Petty	Misdemeanor	No	
	California		Yes	Yes	Misdemeanor	Misdemeanor	No	
	Colorado		No	Yes	Petty	Misdemeanor	No	
	Connecticut		No	Yes	Misdemeanor	Misdemeanor	No	
State Summary	Delaware		No	Yes	Misdemeanor	Misdemeanor	No	
	Florida		Yes	\$10 Limit (1)	Misdemeanor	Misdemeanor	No	
Federal Laws	Georgia		Yes	No	Misdemeanor	Felony	No	
	Hawaii		Yes	Yes	Misdemeanor	Felony	No	
	Idaho		Yes	No	Misdemeanor	Misdemeanor	No	
	Illinois		Yes	No	Misdemeanor	Misdemeanor	Yes	
	Indiana		No	Yes	Misdemeanor	Felony	No	
	Iowa		Yes	No	Misdemeanor	Misdemeanor	No	
	Kansas		Yes	No	Misdemeanor	Felony	No	
	Kentucky		No	Yes	Misdemeanor	Felony	No	
	Louisiana		Yes	Yes	Misdemeanor	Felony	Yes	
	Maine		Yes	Yes	Misdemeanor	Felony	No	
		State		Skill Disregarded	Social Gambling Allowed	Penalty for Simple Gambling	Penalty for Aggravated Gambling	Express Internet Prohibition
		Maryland		Yes	No	Misdemeanor	Felony	No
	Massachusetts		No	Unclear	Misdemeanor	Misdemeanor	No	

Michigan	Yes	No (2)	Misdemeanor	Misdemeanor	Yes	
Minnesota	Yes	Yes	Misdemeanor	Misdemeanor	No	
Mississippi	Yes	No	Misdemeanor	Misdemeanor	No	
Missouri	Yes	No	Misdemeanor (3)	Felony	No	
Montana	Yes	Yes	Misdemeanor	Misdemeanor	No	
Nebraska	Yes	No	Misdemeanor	Misdemeanor	No	
Nevada	Yes	Yes	Misdemeanor	Felony	Yes	
New Hampshire	No	No	Misdemeanor	Felony	No	
New Jersey	Yes	Yes	Misdemeanor	Misdemeanor	No(4)	
New Mexico	Yes	Yes	Misdemeanor	Felony	No	
New York	Yes	Yes	Misdemeanor	Felony	No	
North Carolina	No	No	Misdemeanor	Misdemeanor	No	
North Dakota	No	Yes (5)	Misdemeanor	Felony	No	
Ohio	Yes	Yes	Misdemeanor	Felony	No	
Oklahoma	Yes	No	Misdemeanor	Felony	No	
Oregon	Yes	Yes	Misdemeanor	Felony	Yes	
Pennsylvania	Yes	Unclear	Misdemeanor	Misdemeanor	No	
Rhode Island	Yes	No	Misdemeanor	Felony	No	
South Carolina	Yes	Yes	Misdemeanor	Misdemeanor	No	
South Dakota	Yes	No	Misdemeanor	Misdemeanor	Yes (6)	
Tennessee	Yes	No	Misdemeanor	Felony	No	
			<b>Social Gambling Allowed</b>	<b>Penalty for Simple Gambling</b>	<b>Penalty for Aggravated Gambling</b>	<b>Express Internet Prohibition</b>
Texas	Yes	Skill Disregarded	Yes	Misdemeanor	Misdemeanor	No
Utah	Yes		No	Misdemeanor	Felony	No
Vermont	Yes		Fine Only	Misdemeanor	Misdemeanor	No
Virginia	No		No	Misdemeanor	Felony	No
Washington	Yes		Yes	Misdemeanor	Felony	No
West Virginia	No		No	Misdemeanor	Misdemeanor	No
Wisconsin	Yes		No	Misdemeanor	Felony	Yes
Wyoming	No		Yes	Misdemeanor	Felony	No

**FOOTNOTES**

(1) Florida authorized licensed cardrooms to offer poker limits of \$2 per bet, with a limit of 3 raises per betting round, effective July 1, 2003.

- (2) Michigan has exceptions for Senior citizens homes and state fairs.
- (3) Missouri's felony penalty applies only to a "professional gambler" as defined.
- (4) Senate Bill 1013 pending in the New Jersey legislature seeks to outlaw online gambling.
- (5) North Dakota has a limitation of \$25 per individual hand, game or event. Betting over \$25 is an infraction and it becomes a misdemeanor when the amount exceeds \$500.
- (6) South Dakota's prohibition on applies to those in the "gambling business."

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**Chuck Humphrey is available to help answer questions and analyze and structure transactions.**

Here are links to several sites you may wish to visit also: [Poker Strategy](#), [Gambling Resources](#) and [Gambling books](#).

**Kasper, Jim M.**

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**From:** Allyn Jaffrey Shulman [ajaffrey@cox.net]  
**Sent:** Monday, February 07, 2005 11:37 PM  
**To:** Kasper, Jim M.; jmkasper@amg-nd.com  
**Subject:** Requested Info Regarding Online Poker (2)

*Sorry. The last e-mail didn't have both pages. This one is complete.*

Jim,  
Attached please find a one page document from Barry Shulman regarding online poker stats and a one page document from Allyn regarding the legality of online poker.  
Sincerely,  
Allyn

Allyn Jaffrey Shulman  
Attorney at Law  
[ajaffrey@cox.net](mailto:ajaffrey@cox.net)  
(714) 271-7405  
(949) 495-8707

2/8/2005

## **Online Poker Legality**

By Allyn Jaffrey Shulman  
Attorney at Law  
(714) 271-7405

There currently exists no federal law banning a state from allowing the existence of online poker. Below please find an *extremely* abbreviated explanation.

Since the first online casino opened its 'virtual' doors in 1995, federal lawmakers have proposed legislation to ban online gambling each and every year, with no success. If such law already existed, there would be no need to introduce prohibitive legislation.

In 1996, the 104th Congress created the National Gambling Impact and Policy Commission (Public Law 104-169), whose purpose was to conduct a comprehensive study of the social and economic impacts of gambling in the United States. In 1999, the Commission recommended that Congress pass legislation and develop enforcement strategies affecting Internet Service Providers. Again, if such prohibitions were already in place, such legislation would be superfluous.

It has erroneously been suggested that there are three federal laws that prohibit online poker.

### **The Wire Act**

The words of the statute and the legislative history make it clear that the 1961 Wire act does not speak to online poker as the statute specifically refers to "sports betting". Further the issue has been judicially decided; On February 23, 2001, the Honorable Judge Stanwood R. Duvall, Jr. ruled that the 1961 Wire Act does NOT apply to online poker playing. (*In Re Mastercard International*" 132 F. Supp. 2d 468 (E.D.La. 2001)). In 2002, the U.S. Circuit Court of Appeals in Louisiana affirmed the lower court's ruling.

### **The Anti-Gambling Act. (18 U.S.C. §1955)**

Federal Code section 18 USCS § 1955 (2003) prohibits illegal gambling where such gambling *is a violation of law in the state where it is operating*. By the words of this statute, there is no federal violation as long as the state sanctions online poker.

### **The "RICO" Act 18 U.S.C. §§ 1961-68**

Similar to the Anti-Gambling Act, a violation of Rico requires a crime "chargeable under State law and punishable by imprisonment for more than one year."

### **The Tenth Amendment**

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Laws relating to the health and welfare of its citizens usually fall within the purview of state law. Almost every state has some form of legal gambling, be it a casino, lottery, video, lottery terminal, horse wagering, bingo, or some other form of gambling. Traditionally, the federal government has stayed out of the gambling arena and left its regulation to the states. A respected Congressional Leader, House Majority Whip Tom Delay announced his opposition to proposed legislation regarding Internet gaming for fear that the legislation would diminish state's rights.

### **The Position of the Federal Government**

There is no doubt that both the Clinton and the Bush administration take the *position* that online gambling is illegal. They allude to the Wire Act and other federal laws, but upon careful analysis not one legal expert agrees. Remember, since 1995 when the first online casino began operating, there has not been one single judicial ruling that online poker playing violates *any* federal law whatsoever; quite the contrary. The only judicial ruling available clearly holds that the Wire Act clearly speaks to sports betting, and NOT poker playing.

## **2003 LEGAL OVERVIEW**

**1995 - Present**

by Allyn Jaffrey  
Attorney at Law

In the beginning of this year, I predicted there would be no risk that Internet poker playing would be federally banned in the year 2003. I must confess that it was one of the most effortless predictions I have ever made. This is because one need only review every effort made on Capitol Hill since the first virtual casino came upon the scene in 1995, to understand that Internet poker playing is here to stay.

In 1995, there were about 35 Internet gambling sites. The most conservative estimate is that there are at least 1800 sites today. A recent study estimates that whereas global Internet gambling revenues were \$2.2 billion in 2002, \$5 billion in 2003, that figure will reach \$12.6 billion in 2006.

Let's review some of the noteworthy efforts made on Capitol Hill since 1995 affecting Internet gambling.

Please remember that in order for a bill to become law, a proposed bill must first pass the House and the Senate. Since the House and Senate versions are authored by different Congressmen with different agendas, the bills are always different. If bills relating to the same issue are passed in both the House and Senate, the two versions must be reconciled and again approved by both the House and Senate. Thereafter the combined, approved bill must be signed into law by the President. If a bill is introduced but not passed before congress adjourns, that bill dies and a new bill with a new number must be introduced the following year. One can always tell the difference between a Senate bill which begins with an "S" and a House bill which begins with "HR".

### **1995**

Senator Jon Kyl first circulated proposed legislation that would imprison the online gambler, however, the 1995 Crime Prevention Act was so broad it was unfeasible by all accounts and died in committee without ever being voted upon.

### **1996**

In 1996, the 104<sup>th</sup> Congress created the National Gambling Impact and Policy Commission in 1996. (Public Law 104-169) The stated purpose of the Federal Commission was to conduct a comprehensive study of

the social and economic impacts of gambling in the United States. The Commission recommended that Congress pass legislation and develop enforcement strategies affecting Internet Service Providers, credit card providers, money transfer agencies, makers of wireless communications systems, and banks. (Congress did not complete this study until 1999!)

### **1997**

Sen. Jon Kyl, introduced S 474 (Internet Gambling Prohibition Act of 1997) to the 105th Senate on March 19, 1997. S 474 was a version of his 1995 proposed legislation and attempted to ban all Internet gambling that the 1961 Wire Act did not cover. Internet Gambling site operators and bettors alike would be subject to fines. Further, S 474 would have allowed a state attorney general to issue a restraining order against ISPs that allowed the transmission of bets, wagers, or related gambling information. S 474 passed 90 to 10.

The Goodlatte bill (HR 2380) was introduced to the 105th House of Representatives on September 3, 1997 as the companion bill to S 474. HR 2380 proposed the same general restrictions and penalties as S 474, but never made it out of House Committee on the Judiciary and Congress adjourned before the bill was voted upon.

### **1999**

Sen. Kyl and Rep. Goodlatte tried again to introduce Internet gambling legislation in 1999 with the 106th Congress. Sen. Jon Kyl introduced S 692 on March 23, 1999. S 692 was 28 pages long, with a myriad of exceptions and immunities not included in the 1997 bill. Importantly, this bill did not criminalize internet gambling for the individual bettor. It received full Senate approval, with an amendment which was approved on November 19, 1999.

Rep. Bob Goodlatte introduced the companion bill, HR 3125 on October 21, 1999. The hefty bill was 37 pages long and full of exemptions. Although it had a substantial following, it failed by a margin of 25 votes. Although a motion to reconsider passed without objection, Congress adjourned before it was re-introduced.

### **2000**

Representatives Jim Leach and John LaFalce introduced HR 4419 (also known as the Internet Gambling Funding Prohibition Act) to the 106th House of Representatives on May 10, 2000. HR 4419 prohibited the use of checks, credit cards, and electronic fund transfers for Internet

Gambling. The bill was immediately submitted to the House Committee on Banking and Financial Services and arguments were heard June 20, 2000. After considerable debate regarding which amendments would be approved, HR 4419 remained in the Judiciary Committee until Congress adjourned.

## 2001

Rep. Jim Leach introduced HR 556 (known as either "The Unlawful Internet Gambling Funding Prohibition Act" or the "Leach-LaFalce Act") to the 107th House of Representatives on February 12, 2001. HR 556 is essentially a continuation of HR 4419. That bill outlawed usage of a credit card, electronic fund transfer or any other bank instrument to pay for Internet gambling. It also provided a vehicle requiring U.S. Internet service providers (ISPs) to block access to or pull advertising from offshore Web gambling sites. You may remember CardPlayer.com sent out a Special Bulletin explaining the bill when it passed. It passed by a special suspension of the regular house rules by a "voice vote" consisting of 7 members of the house out of a total of 435 members.

No bill similar to HR 556 passed in the Senate in 2001.

Rep. John J. LaFalce introduced HR 2579 (also known as the Internet Gambling Payments Prohibition Act) to the 107th House of Representatives on July 20, 2001. HR 2579 was created as an alternative to HR 556. The difference was that this bill assumed that all Internet gambling was illegal as opposed to the language in HR 556, which only prohibited "unlawful" Internet Gambling, which was defined in the statute as gambling not permitted by the state. This bill was lost in a subcommittee late in 2001.

Rep. Michael G. Oxley introduced HR 3004 (also known as the Financial Anti-Terrorism Act of 2001) to the 107th House of Representatives on October 3, 2001. HR 3004 was created to combat the financing of terrorism in light of the September 11, 2001 attack. Many analysts believe it was hastily put together. The bill covered money laundering and "suspicious" financial transactions. Originally there were anti-gambling sections in the Anti-Terrorism Act which were promptly eliminated. Removed were sections 303 and 304 which dealt with illegal financial transactions for internet gambling within the United States. HR 3004 went to the floor without the Internet Gambling portion and passed 412 to 1 on October 17, 2001.

Sen. Thomas Daschle, introduced the companion bill, S 1510 (also known as the Uniting and Strengthening America Act) on October 4, 2001. S 1510 contained NO Internet Gambling provisions at all and it passed without conflict on October 11, 2001 by a vote of 96 to 1.

## 2002

In late 2002, John Conyers, Jr., introduced a bill that would create a five-member commission to study the feasibility of making Internet gambling legal in the United States. HR 5760, known as the Internet Gambling Licensing and Regulation Commission Act had no chance of passing in 2002 since the Senate had already adjourned when the bill was introduced. Conyers said he meant to start a dialogue for the next Congress.

## 2003

Congressman Conyers from the US House of Representatives introduced HR 1223 (also known as the "Internet Gambling Licensing and Regulation Commission Act"). This is a re-introduction of his similar 2002 bill.

Rep. James A. Leach reintroduced a version of the Unlawful Internet Gambling Funding Prohibition Act (HR 566). The new bill number is HR 21. It is predominantly a reconciliation of HR 556 and HR 3215.

On May 19<sup>th</sup> of this year, Rep Bachus introduced HR 2143. H.R. 2143 (also known as the Unlawful Internet Gambling Funding Prohibition Act) passed in the House of Representatives by a vote of 319-104. The bill contains no criminal or civil liabilities and it is a shell of last year's version. It does not make online poker playing illegal; it merely makes it more difficult to get money into an offshore site.

A similar bill was introduced in the Senate. S 627 prohibits gambling businesses from accepting credit cards, checks, or other bank instruments from gamblers who illegally bet over the Internet. This remains the only legislation that is any threat to Internet poker playing. However, all the bill will accomplish is to prevent the use of credit cards, checks, and electronic fund transfers for Internet gambling. Since Internet gamblers no longer use "credit cards, checks, and electronic fund transfers", this year's legislation will not even put a dent into the five billion generated this year from Internet gambling.

## AS I PREDICTED

By Allyn Jaffrey  
Attorney at Law

A number of months ago, I researched and analyzed The 1961 Wire Act and concluded that online poker playing is EXCLUDED from its reach. I came to this conclusion for the following reasons:

- 1) The WORDS of the statute specifically prohibit SPORTS BETTING and nothing more.
- 2) The LEGISLATIVE HISTORY indicates the statute was aimed at organized crime, specifically in the area of sports betting.
- 3) CASE LAW construes the statute as applying to sports betting.
- 4) The only CASE ON POINT to address the issue specifically found that the Wire Act does not apply to online gambling; and
- 5) Recent PROPOSED AMENDMENTS to the Wire Act demonstrate that legislators do not believe that the statute prohibits online gambling.

The case on point to which I refer in number 4 above is "In Re Mastercard International", decided February 23, 2001, the Honorable Judge Stanwood R. Duval, Jr. presiding. Among other issues, he was faced with the question of whether the Wire Act applied to online gambling. The posture of the case was interesting because many deadbeat gamblers attempted to avoid online gambling debts they had incurred by alleging that the money they owed their credit card companies amounted to illegal gambling debts in violation of the Wire Act. As a matter of fact, there were so many similar suits filed by so many gamblers who did not want to pay their losses, that the lower court consolidated 33 such similar charges.

As I reported in August, Judge Duvall ruled that the Wire Act only prohibited wagering on SPORTS EVENTS and he dismissed all 33 cases. "Comparing the face of the Wire Act and the history surrounding its enactment with the recently proposed legislation, it becomes more certain that the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests."

Instead of simply paying the gambling debt legitimately owed, the disgruntled plaintiffs generously decided to give more money to their lawyers and brought the issue to the appellate level. On November 20<sup>th</sup>, a three-judge panel of the 5th U.S. Circuit Court of Appeals in Louisiana affirmed Duvall's dismissal, calling his ruling "thorough and careful". The appeals court held that the gamblers failed to prove that online casinos and the credit card companies they used to process their wagers violated federal racketeering laws or the 1961 Wire Act. <http://caselaw.lp.findlaw.com/data2/circs/5th/0130389p.pdf> With regard to the use of a credit card, the court held that transferring money to the player occurred PRIOR to the gambling and so could not be considered to have anything to do with "gambling" or profiting from gambling. With regard to the Wire Act's application to online gambling, the court reached the same conclusion reached by myself and Judge Duvall:

"We agree with the District Court's *statutory interpretation*, its reading of the *relevant case law*, its summary of relevant *legislative history*, and its conclusion. The plaintiffs may NOT rely upon the Wire Act..... Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling, are not illegal."

The fact that an appellate court has now ruled that The Wire Act does not apply to online gambling is not the end of the road, but it is getting closer. It evidences clear, rational, solid, legal analysis on the issue. However, there is still the highest court of the land, the US Supreme Court, who can decide either to grant a hearing or issue a summary denial, IF and ONLY IF the plaintiffs appeal the Appellate Court's decision.

To put the ruling in perspective, let's now revisit the issues going on in Nevada. On June 14, 2001, Nevada Governor Kenny Guinn approved Assembly Bill 466 which empowers the Nevada Gaming Commission to adopt regulations governing the licensing and operation of on-line gaming. However, Nevada Gaming Control Board Chairman Neilander did not want to make a drastic mistake by unwittingly enacting rules and regulations which violated federal law, so he first asked the Nevada Attorney General (AG) for his opinion regarding whether online gambling was legal. Almost a year after the legislation passed, Nevada's Assistant Chief Deputy Attorney General Jeff Rodefer prepared a lengthy report which concluded that federal laws on the issue are unclear! Thereafter, Neilander asked the United States AG for an opinion. Please note that an advisory opinion from the AG is only the opinion of a government employee whose job is to enforce the law. It is not binding on a COURT, who interprets laws. On August 30, 2002, Assistant Attorney General Michael Chertoff sent a letter to Neilander, reiterating the perfunctory opinion held by the Clinton administration: "As set forth in prior congressional testimony, the Department of Justice believes that federal law prohibits gambling over the Internet, including casino-style gambling." Well, the reason gaming attorneys and others who have analyzed the issue are disillusioned and frustrated with this ostensibly "legal" opinion is because it is devoid of any legal reasoning. It smacks of a political and not a legal opinion. A legal opinion must analyze the WORDS of a statute, the LEGISLATIVE HISTORY of a statute, relevant CASE LAW, and PROPOSED AMENDMENTS to such law. Chertoff promptly HALTS commerce in Nevada by delivering such a damaging opinion to Neilander. And even though the opinion is not legally justified or binding, Nevada is now afraid to move forward in the online gambling arena. This is because IF the opinion were ultimately found to be correct, Nevada would be on NOTICE that this is the correct interpretation of the law. And when Chertoff's advisory opinion is found to be wrong, the AG will say, no harm, no foul.

Meanwhile, in the House, Leach and LaFalce were involved in their own sham, passing the Unlawful Internet Gambling Funding Prohibition Act (HR 556) by a voice vote consisting of SEVEN members of the House, certainly knowing the senate would not visit the issue this year. As predicted, no action was taken in the senate enforcing the view that the rushed vote was merely political maneuvering. What all this does show, is that there are a vocal number governmental officials who are so opposed to online gambling that they will compromise honorable behavior for political expediency.

*Allyn Jaffrey received her Bachelor of Arts from the University of California at Irvine in 1977, where she graduated cum laude and became a member of Phi Beta Kappa for scholastic achievement. She is a practicing criminal defense attorney, having received a Juris Doctorate with scholastic merit from Western State University where she served as Research Editor and Executive Editor of Law Review in 1982-1983. She has lectured all over California, teaching other attorneys the fine points of criminal defense. She specializes in legal research and her areas of expertise include the filing of extraordinary Writs, Appeals and motions where a lower court judge commits legal error or where the police or prosecutors engage in misconduct. Allyn has been closely following the development of gaming law and the Internet ever since Jay Cohen was convicted in New York of operating a sports betting business from Antigua in violation of the Wire Act.*

## In My Opinion

By Allyn Jaffrey  
Attorney at Law

In my opinion, there is no risk that on-line gambling will be federally banned in the year 2003. Just as every action causes a reaction, efforts to ban Internet gambling will always be met by creative efforts to circumvent any small gain achieved by Internet gambling opponents. Gaming analysts estimate that on-line gambling will reach 4-6 billion dollars in revenue in the year 2003. There is ~~a~~ no way this booming industry will be halted.

Let's take a brief look at recent legal developments regarding online poker. As you will remember, I predicted months ago, that the 1961 Federal Wire Act would be judicially found NOT to apply to online gambling notwithstanding the fact that the US attorney general's opinion was to the contrary. In ~~February~~ of 2001, the Honorable Judge Stanwood R. Duval ruled that the Wire Act did NOT apply to online poker in the case of *In Re Mastercard International*. Finally, almost two years later, the US Court of Appeals recently held: "We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion." The court concluded in simple terms that "...the Wire Act does not prohibit non-sports internet gambling..." That's clearly a win for online gambling.

Next, let's take a quick look at the composition of the house and senate in order to predict the passage of future bills. As a result of the November 2002 election, the Republicans gained majority control of the Senate and retained control of the House. Senator Trent Lott (R-MS) will regain his position as Majority Leader and Representative Dennis Hastert (R-IL) will remain Speaker of

the House. This Republican control might make some people nervous, but there are many competing voices to be heard in congress. For example, Rep. James A. Leach reintroduced the Unlawful Internet Gambling Funding Prohibition Act (HR 566) this year in the 108th Congress. For future reference, the new bill number is H.R. 21. H.R. 21 would bar Internet gambling sites access to the U.S. financial services system by preventing the use of credit cards, wire transfers, or any other bank instrument to fund gaming transactions. You will remember that the bill passed in the House of Representatives last year by voice vote when the normal rules were suspended, and the Senate never considered it. So now comes Leach reintroducing the same bill which was always fraught with problems. That is WHY Leach snuck it through by a voice vote consisting of only a handful of representatives. The new bill (HR 21) is worded precisely the same as the previous bill (HR566) which died on the House floor.

Meanwhile, Detroit Democrat John Conyers, Jr., will soon be reintroducing his bill that would create a five-member commission to study the feasibility of making Internet gambling legal in the United States. Conyers said that the aim of the bill is to move the focus on Capitol Hill away from discussions regarding how to BAN Internet gambling and instead, refocus on how the government might create consumer protections by REGULATING Internet gambling. As you can see there are competing forces which will cause raging debates on Capitol Hill for a long time to come.

Elsewhere, the Casino Control Commission of the U.S. Virgin Islands adopted regulations for Internet gaming. The commission acted after an opinion by the territory's attorney general, who stated that online gaming is legal in the U.S. Virgin Islands as long as operators can be certain that players are of lawful age and that they are placing bets only from jurisdictions where such gaming is not illegal. The

legislation and regulations in the U.S. Virgin Islands provide for the establishment of two Master Service Providers, which are the only entities authorized to host the physical operations of approved Internet gaming sites. The two Master Service Providers as referenced in the legislation are the St. Croix Internet Group LLC and U.S.V.I. Technologies Initiative LLP. Frank Catania, former Assistant Attorney General and Director of the New Jersey Division of Gaming Enforcement and former Chair of the International Association of Gaming Regulators, said, "Under the leadership of Judge Eileen Petersen, Chair of the Casino Control Commission, the U.S. Virgin Islands has adopted tough rules that should ensure fair and responsible online gaming in that jurisdiction." The Virgin Islands may well end up providing a model for future regulations.

With both houses of Congress now under Republican control, some predict that a bill may land on President Bush's desk before the end of the current session. However, the current legislation only prohibits Americans from using credit cards or other financial instruments for Internet wagering. That has Internet sites scrambling for other means of funding, such as digital e-cash, which will allow them continued access to the biggest market, the United States. Most experts say e-cash, a digital form of money capable of being stored on hard drives and transferred over the Internet, will eventually save the day because it is instantaneous and inexpensive.

I began this article speaking of how every action causes a reaction. In my opinion, the worst that will be seen in 2003, would be the passage of legislation prohibiting credit card companies from funding online gambling. Doubtless, this will surely be met by either black market funding, digital e-cash or some other method of funding online gambling.

## Liability of the Online Gambler

By Allyn Jaffrey  
Attorney at Law

Notwithstanding the fact that a few states have passed legislation prohibiting online gambling, no state has attempted to enforce such legislation. This article will explore the liability of the online gambler and the insurmountable obstacles the government would face prosecuting the online poker player.

### DUE PROCESS

The Fifth and Fourteenth Amendments to the United States Constitution and California Constitution Article I sections 7 and 15 provide that no person may be deprived of life, liberty, or property without due process of law. Every other state Constitution has a due process clause as well. The concept of due process is the most comprehensive of our constitutionally protected rights and is also the most difficult to grasp. This is because due process is not susceptible to reduction into a formula or a static definition. *People v. Martinez* (1957) 154 Cal.App.2d 233. Due process basically means that the government guarantees that it will treat its citizens fairly.

"Due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts... Whether the constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account". (*Hannah v. Larche* (1960) 363 U.S. 420, 442; *In Re Tucker* (1971) 5 Cal.3d 171, 179.) Whether a prosecution be state or federal, the concern of due process is with the fair administration of justice. (*Mayberry v. Madison* (1971) 400 U.S. 462,465.)

In the context of a lawsuit, due process demands that people not be dragged into court to defend themselves unless it would be FAIR to do so. It would not be FAIR to force someone to defend himself in a state where he has minimal ties. This is known as the concept of jurisdiction.

### JURISDICTION

A prerequisite to the successful initiation of a lawsuit is that a court have JURISDICTION to preside over a given case and its parties. A jurisdictional question may be broken down into three parts: 1) jurisdiction over the person (*in personam*), 2) jurisdiction over the subject matter, (*res*), and 3) jurisdiction to render the judgment sought.

Jurisdiction in personam refers to the courts power to compel a person or a business to personally appear in court in order to defend or prosecute a lawsuit. The seminal case on personal jurisdiction is *International Shoe Co. v. Washington* (1945) 326 US 310. *International Shoe Co.* established that a defendant who was not present

within the territory of the forum must have certain minimum contacts with the forum such that maintaining a suit there does not offend traditional notions of fair play and substantial justice. Further, a state may not make a binding judgment in personam against a defendant where he has no contacts, ties, or relations therein. (*Id.* at 319).

*Hanson v. Denckla* (1958) 357 US 235, 250-253 defines minimum contacts as "some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws".

A few years back, the Minnesota Supreme Court grappled with the issue of whether advertising on the Internet would be sufficient grounds to assert personal jurisdiction over the parties who had no other contacts within the state. In *Minnesota v. Granite Gate Resorts*, the server for the online gaming site was in Belize but the advertiser was in Nevada claiming that they provided a LEGAL way to gamble from any where in the world 24 hours a day. The lower court held that placing an advertisement on a web site accessible to Minnesota citizens was a sufficient contact with Minnesota to subject a Nevada web master to personal jurisdiction in Minnesota. The decision was affirmed by the Minnesota Supreme Court in 1999. Although a Supreme Court case from one state is not binding on any other state, Internet gaming sites took notice.

Because of the *Granite Gate Resort* case and the legal theory it embodies, you will NEVER find an Internet Gaming company asserting that it is legal to play poker on their site. Instead, every single Internet Gambling Site places the onus on the player to know whether or not gambling is legal in the jurisdiction where the player is accessing the site. As a matter of fact, players cannot set up an account unless and until they sign a disclaimer and agree not to participate in the real money games if they reside in a jurisdiction where it is not legal to do so. You may wonder why every gambling site has play money games? There is a legal reason and a business reason for play-money games. The legal reason is to insulate the site and it's operators from liability because they can invite everyone from every jurisdiction to visit their site with the caveat that the player is ONLY invited to play in the play-money games if they reside in a jurisdiction where gambling is prohibited. Therefore, the site can, in good conscience, offer gambling on the Internet, knowing the site reaches everyone from every jurisdiction, without worrying that they will be sued for offering gambling in a jurisdiction where it is illegal. The site's defense is clearly that they certainly do NOT offer gambling where it is illegal as every player has specifically agreed to enjoy play-games but not real money games in jurisdictions where such is prohibited.

A few states have passed statutes making it unlawful to participate in Internet gambling. For example, Illinois passed legislation that criminalized the activity of the individual bettor, making it a class A misdemeanor. (720 ILCS 5/28-1 (2001)(a)(c)) The legislation was ridiculed by District Attorneys causing The Chicago Sun Times to conclude that the legislation "has bark and no bite" and that "without cybercops monitoring households and their computers, the law will be difficult to enforce."

A criminal case must be pled and proved with specificity. What this means is that a crime must be alleged to have occurred on a specific date in a specific place, in order that the accused can lodge a defense. I invite you to consider just HOW the state could prove that you were playing poker in their jurisdiction.

First, a county prosecutor would have to have sufficient information to file a lawsuit against an individual and then prove that the crime occurred within that county. With the advent of the Internet and laptop computers, it is impossible to prove that someone was playing poker in a certain jurisdiction. I recently vacationed in Jamaica and the government would have no way of knowing whether I accessed a poker site from Jamaica, my stopovers or Orange County, where I reside. If a prosecutor cannot prove jurisdiction, the case gets thrown out of court at its inception.

### PROVING IDENTITY

In a criminal case, the state must prove that the defendant is in fact, the person who committed the crime. How can the state prove who is sitting at the computer playing poker?

Many years ago when I was still skeptical about online gaming, David Sklansky was kind enough to introduce me to the world of on-line poker. He turned on his computer and went to a popular site. I will never forget what happened! Right there, plain as could be, there was a player using the name Dsklansky, pontificating, but saying some really dumb things! Our mouths dropped open; we did a double take, and then got hysterical! Now I was standing there with David and I watched him log in using his anonymous online name as he sat next to the fellow calling himself dsklansky. People were asking the phony DSKlansky questions and David grimaced as the impersonator gave some really terrible answers.

This brings to mind the question regarding how a government would ever be able to prove WHO was sitting at the computer playing poker. Certainly, the name the person uses and their persona would not be proof of a person's identity. Next, the usual method of proving up this kind of case would be to subpoena the records of the business. However, all gambling sites are located outside the US jurisdiction and foreign jurisdictions do not honor US subpoenas, nor does our government have the power to ENFORCE our subpoenas outside the US. Without records, it would be nearly impossible to prove WHO was playing poker at a site. Would a cybercop watch the game and then record it? Would a witness testify that he played with someone using a certain name and then the state would somehow try to prove that this handle belonged to a certain person? Even if the handle belonged to a certain person, was it that person playing poker at the specific time of the allegation?

Let's try a different angle. Suppose the state subpoenas records from Visa which shows that your credit card was used on the site. The government does not have access to the business records of the site in order to connect up the fact that your

money is being used by you to play poker. If the site has an on-line store selling tee-shirts, hats and other items, there is no way of knowing for what purpose the money was used. And even if Visa records prove that money from your account was put on the site, this still does not prove that you are the person sitting at the other end of the computer playing poker.

If we add to this, the fact that prosecutors have the responsibility of prosecuting every crime in their jurisdiction, it becomes clear that prosecuting an online poker player is very low on the priority list of a DA's office even where such activity is prohibited AND an extremely arduous task to accomplish.

Going after illegal gambling has never been a high priority with prosecutors, unless it appears that organized crime is involved. Given the fact that the US Attorney General's office has stated that they "strongly oppose any legislation that would seek to make the activity of mere bettors - - those not in the business of betting or wagering - a violation of federal law", prosecuting the individual bettor in state or federal court is highly unlikely.

**Kasper, Jim M.**

---

**From:** Frank Catania [frank@cataniaconsulting.com]  
**Sent:** Friday, February 04, 2005 1:40 PM  
**To:** Kasper, Jim M.  
**Subject:** House Bill 1509I

Dear Representative Kasper;

By way of introduction I am the former Assistant Attorney General, Director of the Division of Gaming Enforcement for the State of New Jersey. I was also Deputy Speaker of the General Assembly before being appointed Director of the DGE. Since leaving the state I have been an advocate for the strict regulation of Internet gaming. In my opinion since most of the world is choosing to regulate Internet gaming it would be impossible to enforce any type of federal legislation prohibiting it.

Your Bill 1509 makes sense and it could be regulated better than the traditional land based casino because of real time auditing and other checks and balances not available to land based casinos. I have a tremendous amount of background information should you or your staff need it and I would also be available to testify before any legislative committees. In the past I have testified before the House Judiciary Committee and the Senate Banking Committee on the same subject of strict regulation for Internet gaming, which, is without a question a states right.

I attach my cv which gives my background.

Regards and Good Luck  
Frank Catania

Frank Catania  
Catania Consulting Group, Inc.  
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2/7/2005

**Kasper, Jim M.**

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**From:** Jeff@micropowercorp.com  
**Sent:** Thursday, February 03, 2005 5:49 PM  
**To:** Kasper, Jim M.  
**Subject:** Poker Legislation HB1509...  
**Importance:** High

Sir,

Yesterday, I came across a news article in the Tribune announcing your intention to submit HB 1509 for consideration, wherein online poker would be coded as a game of skill and therefore legal in North Dakota as defined under a proposed addition to Title 53.

In my opinion, this strategy and subsequent legislation (if agreed to by state legislators) would indeed set the stage to bring not millions of dollars but rather *hundreds of millions of dollars* to the greater state of North Dakota through what would become the first, fully-licensed and regulated online poker gaming commission in the United States.

Taxation and licensing revenues are just the 'tip of the iceberg', however, as North Dakota (i.e. Fargo) would be flooded with the high tech, high paying jobs needed to sustain the infrastructure of any number of poker gaming entities - entities that would seek to relocate millions of dollars worth of equipment for the simple fact that they would be able to take bets from and market to US citizens under the auspices and protection of an *American* gaming commission.

Further to enjoying said licensing regime, professional operators would have access to the world-class security, bandwidth, convenience and expertise that one expects from American industry.

As for the online poker market proper, the numbers are simply stunning...

- there are some 70 million poker players in the US alone
- US citizens make up 70% - 80% of the online poker market in total
- every 24hrs, approximately US \$180 million is wagered on poker worldwide (up from US \$100 million just 6 months ago)
- 2 million participants enjoy the game online each month (a figure sustained by month on month, double digit increase).
  
- there are currently 230 poker rooms on the internet today (up from 3 in 1999)
- ParadisePoker was recently acquired by a British sportsbetting firm for US \$300 million (this after barely 5 years of operation)
  
- PartyPoker (the world's largest online poker destination) has 20,000 - 40,000 concurrent players online at any one time (the equivalent of 5 football fields of poker tables)
  
- PartyPoker is set for a US \$6 billion placement *directly* to London's FTSE

Which brings me to the conclusion and thus purpose of this letter... that is, simply to introduce myself and perhaps offer my knowledge and expertise in seeing the successful implementation of HB 1509.

Please feel free to contact me directly for further information at your convenience below.

Best Regards,

2/4/2005

**J. Eltom** B.A.

**Micropower Corporation**

[www.micropowercorp.com](http://www.micropowercorp.com)

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**International** 001.604.662.7468

**Mobile** 001.604.729.5992

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**DE COUNSELING SERVICE**

Specializing in Treatment of Compulsive Gamblers

**DICK ELEFSON**

LAC, LSW, Director

418 East Rosser Avenue - Suite E  
Bismarck, North Dakota 58501

701-255-2756

February 9, 2005

The Honorable Duane DeKrey, Chairman  
North Dakota House of Representatives  
Judiciary Committee  
600 E. Boulevard Avenue  
Bismarck, N. D. 58505

Dear Representative DeKrey:

I am writing in opposition to HB 1509. My contention is that there are brown horses, tan horses, gray horses, white horse, black horses and combinations of a variety of colors and breeds. But, the fact remains they are all horses.

If you want an accurate definition of gambling, go to the experts, members of Gamblers Anonymous. There are no greater experts alive.

I refer you to Sharing Recovery Through Gamblers Anonymous, Chapter I, page 1 which reads "Gambling is defined by the Fellowship of Gamblers Anonymous as any betting or wagering, for self or others, whether for money or not, no matter how slight or insignificant, where the outcome is uncertain or depends upon chance or "skill" constitutes gambling."

I am enclosing copies for the members of your Committee, and I urge you to share this information with them, and vote a DO NOT PASS recommendation and to the full house when HB-1509 comes to a vote.

Thank you for your consideration.

Sincerely,



Dick Elefson LAC LSW

**Speakers for ND HB 1509  
Senate Judiciary Committee Hearing  
Tuesday March 8, 2005**

**Sue Schneider – River City Group  
St. Charles, Missouri**

**Michael Corfman – Casino City, Inc.  
Boston, Mass.**

**Nigel Payne – Paradise Poker  
London, England**

**Frank Catania – Former NJ gaming regulator  
New Jersey**

**Pat O'Brien – Greenburg Turiug  
Florida**

**Allyn Jaffrey Shulman – Attorney & Player  
California**

**Peter Friedman CPA  
New Hampshire**

***Patrick O'Brien – Attorney***

Patrick O'Brien spent 25 years as a Special Agent with the U.S. Customs Service before becoming an attorney. In those years, he occupied numerous important positions, including Special Agent in Charge of South Florida and the Caribbean, and Assistant Regional Commissioner New York, where his primary responsibilities involved combating drug trafficking and money laundering. He was also the Service's Director of Internal Security for several years, and was responsible for the investigation of all allegations of internal fraud and corruption.

Since joining Greenberg Traurig, he has focused his law practice on Internet gaming and international banking.

Patrick's first contact with the Internet gaming industry occurred in 1998. He was living in Antigua drafting and enforcing anti-money laundering and offshore banking legislation, when Antigua was the Internet gaming capital of the world. He met many of the major site operators there, and found them to be innovative businessmen, capitalizing on a fantastic opportunity.

Most thought Internet gaming was legal, and they were shocked when the U.S. started prosecuting U.S. citizens involved in sports gambling businesses. When he returned to the States, he came back with several clients who were U.S. citizens, and when they sold their interests to non-U.S. purchasers, such as Sportingbet, he developed a client base of non-U.S. gaming operators.

For the past five years, he has been representing operators, transaction processors, media outlets, banks and others involved in the industry throughout the world.

***Peter H. Friedman – Friedman CPAs***

Peter H. Friedman is the proprietor of a Certified Public Accounting firm that specializes in economic/financial and taxation consulting for businesses. He has been invited, and attended the annual U.S. Securities and Exchange Commission Government-Business Forum on Small Business Capital Formation since 1992.

Mr. Friedman was an expert witness at the U.S. Government ECommerce Tax Advisory Commission public forums. He contributed to the Independent Game Developers Association 2003, 2004 and 2005 Online Game White Paper on legal, tax and financial issues of wireless gaming. He has frequently lectured in front of various State Bar and CPA Societies on electronic commerce and the Sarbanes-Oxley Act of 2002.

He has testified in front of the New Hampshire Senate in regards to various tax bills and has been an invited participant by the NH Department of Revenue in the revision of both tax laws and regulations. Mr. Friedman lectured in December 2002 on at a seminar entitled "Emerging Issues in online Entertainment and Interactive Gaming Operations." He lectured at the Electronic Frontier Foundation Convention in Atlanta in 2003 and 2004 on taxation of online gaming and nexus. He lectured at the 2004 GDC on compensation and employment tax issues. He was the Chairman of the Tax committee of the New Hampshire Society of CPA's until 2003 and was a member of the Board of Directors of the New Hampshire Society of CPA's until 2004.

Mr. Friedman currently serves on the Board of Directors of a non-profit theatre. Mr. Friedman is licensed to practice in the States of New Hampshire and New York. Mr. Friedman is registered with the Public Company Accounting Oversight Board.

***Michael Corfman – Casino City, Inc.***

Michael Corfman is the President and CEO of Casino City, Inc. The Casino City website was initially launched under his direction in 1995 and today it has grown to be the most popular gaming directory on the web with well over a million visitors every month. The Casino City network includes the most complete directory of land and online gaming on the web plus the largest collection of gaming news and gaming strategy articles available anywhere.

He is also President of Casino City Press, a major publisher of business information in book, CD, and online subscription service format about both the land and online gaming industries. Titles created under his guidance published in 2004 include Casino City's Online Gaming Business Directory and Gaming Business Directory, Casino City's Global Gaming Almanac, and Casino City's Worldwide Casino Guide.

Michael is well known within the online gaming industry. IGamingBusiness Magazine recently called him its white knight based on his lawsuit against the U.S. Department of Justice seeking a declaratory judgement to establish the First Amendment right to advertise online gaming. He graduated from the Massachusetts Institute of Technology in 1975 with a degree in Computer Science, and brings a strong analytical focus to all Casino City projects.

***Frank Catania – Catania Consulting Group, Inc.***

Frank Catania is president and a principal in Catania Consulting Group, Inc. of New Jersey, a consulting firm with extensive experience in gaming issues. An attorney, he is also counsel to Catania & Associates, Law Offices, LLC.

Mr. Catania's gaming expertise stems from his years as Assistant Attorney General, Director New Jersey Division of Gaming Enforcement; Vice President, Compliance Officer, Players International; Deputy Speaker of the New Jersey General Assembly and counsel to the Law Firm of Sterns and Weinroth.

He served as the first president of the International Masters of Gaming Law, vice chair and chair, respectively, of the International Association of Gaming Regulators, past chairman of the Forum of American Casino Regulators, and was the first President of the International Masters of Gaming Law (IMGL), a non-profit association dedicated to the education and advancement of gaming law.

Mr. Catania has been published on a wide variety of casino gaming and government-related topics in several national publications, regional newspapers, and trade publications.

He is a graduate of Rutgers College and received his JD from Seton Hall University Law School.

***Allyn Jaffrey Shulman – Professional Player/Attorney***

Allyn Jaffrey Shulman is one of the world's leading experts on online gambling law. Having been a courtroom attorney, practicing criminal defense for over 20 years, her expertise lies in the area of complex legal analysis, issues of constitutional magnitude, police and judicial misconduct and contempt of court. She is widely published and has lectured all over California teaching other attorneys the fine points of complex litigation. Shulman is the lawyer's lawyer.

### ***Sue Schneider – River City Group***

Sue Schneider is the CEO/President of River City Group LLC in St. Louis, Mo. The company publishes a subscription-based electronic magazine, Interactive Gaming News ([www.igamingnews.com](http://www.igamingnews.com)) as well as syndicated research reports. It offers a wide range of industry-related services such as market research, regional and international Summits, executive placement and brokerage services.

She wrote a monthly column on interactive gambling for International Gaming and Wagering Business (IGWB) magazine for several years and now writes for Global Gaming Business magazine. She has been a contributing writer for each edition of the Internet Gambling Report; originally published by Trace Publications, her company has now taken over publication of that book.

Schneider served as Chairman of the Interactive Gaming Council (IGC), a trade association, since its inception in 1996 until 2004. IGC has a Code of Conduct for its members which aims at enhancing consumer protection as well as a Code of Practice for advertising and Responsible Gaming Guidelines.

She is a frequent speaker at international gaming conferences and has testified to both the US Senate, the US House of Representatives as well as the National Gambling Impact Study Commission in that country.

She is determined to stay on the information side of the gaming industry after her previous experience in gaming which was a six year stint running charitable bingo.

### ***Nigel Payne – Paradise Poker***

Nigel Payne, aged 44, is Group Chief Executive of Sportingbet Plc, the largest Internet sports and gaming betting business in the world. Sportingbet, which is publicly quoted on the London Stock Exchange, has annual turnover of over \$2.5 billion and has a market capitalization today of over \$2 billion.

Sportingbet deals 10 hands of poker per second and takes 15 gaming bets per second across the world to its global customer base of over 2.3 million customers. Sportingbet operates under regulated license in most markets of the world but not within the United States, where to date licenses are not available.

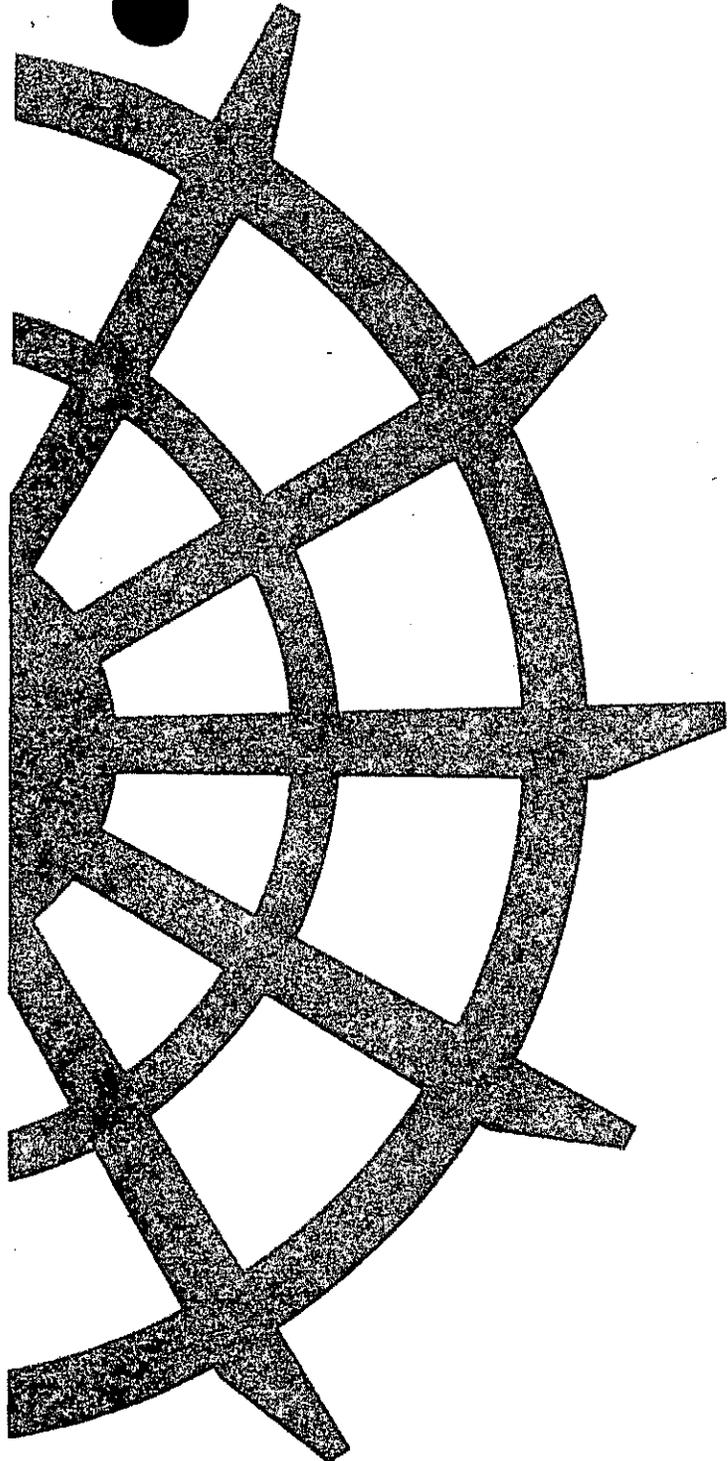
Nigel joined Sportingbet in May 2000 as Group Finance Director and successfully steered the Company through three fundraisings, a Listing on the London Stock Market and the acquisition of four major businesses serving the Australian and American markets. Nigel was promoted to Group Chief Executive in November 2001.

Nigel is passionate about the need for the industry to be properly regulated and has presented to the UK Government, the UK House of Lords, the European Parliament, the Australian Parliament and various members of the U.S. political structure.

Between 1994 and 2000 Nigel was Group Finance Director of Polestar Magazines, Europe's largest magazine printer. Nigel has also held senior Directorships at Scottish & Newcastle and Brann Direct Marketing. Nigel qualified as a Chartered Accountant in 1984.

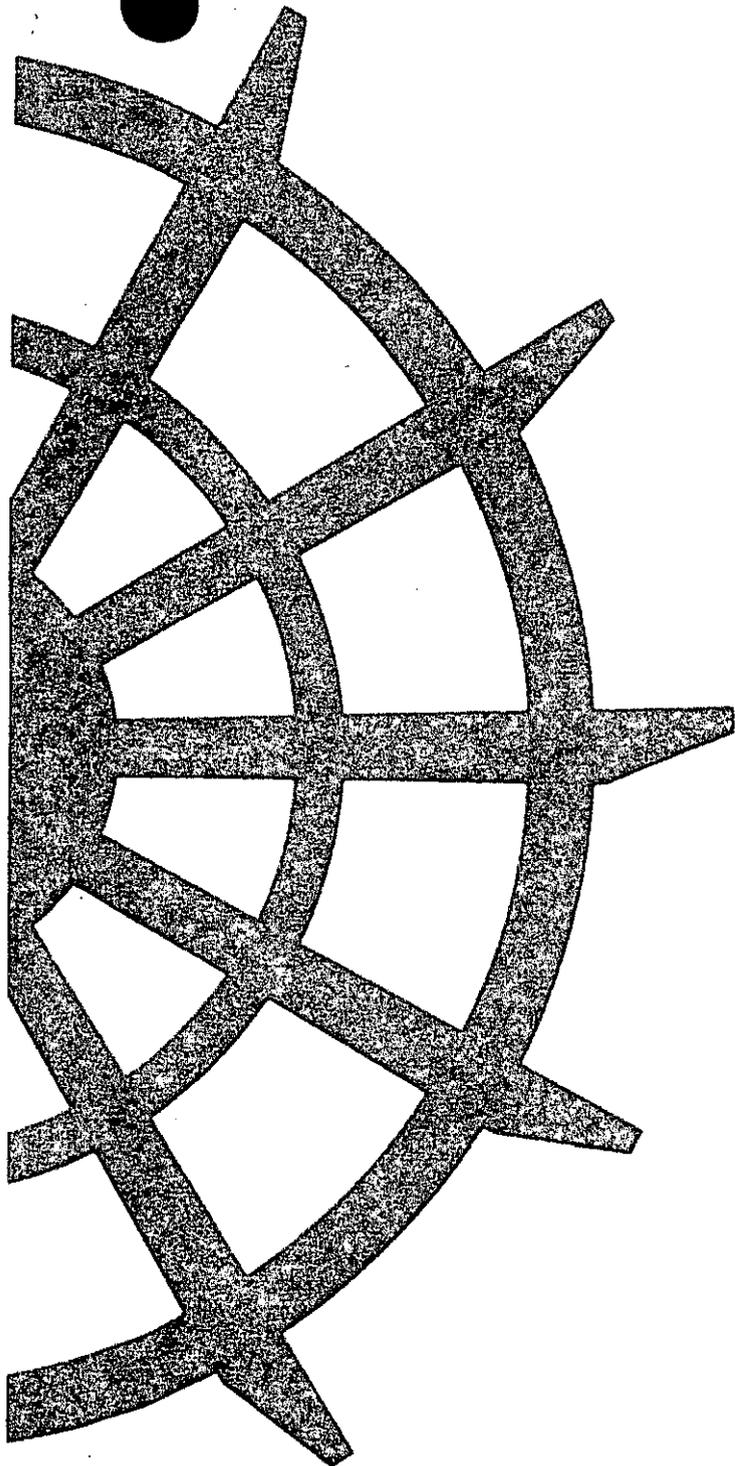
Married with two children, Nigel's hobbies include Formula 1 Motor Racing, Table Tennis, Cinema, eating the very best food and drinking fine wines.

AH 2



# Interactive Gaming Update

March 8, 2005  
North Dakota Senate  
Bismarck, North Dakota



## **Presenter: Sue Schneider**

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CEO/President, River City Group

Publisher, Interactive Gaming News

Former Chairman, Interactive  
Gaming Council (1997-2004)

# Interactive Gaming Update

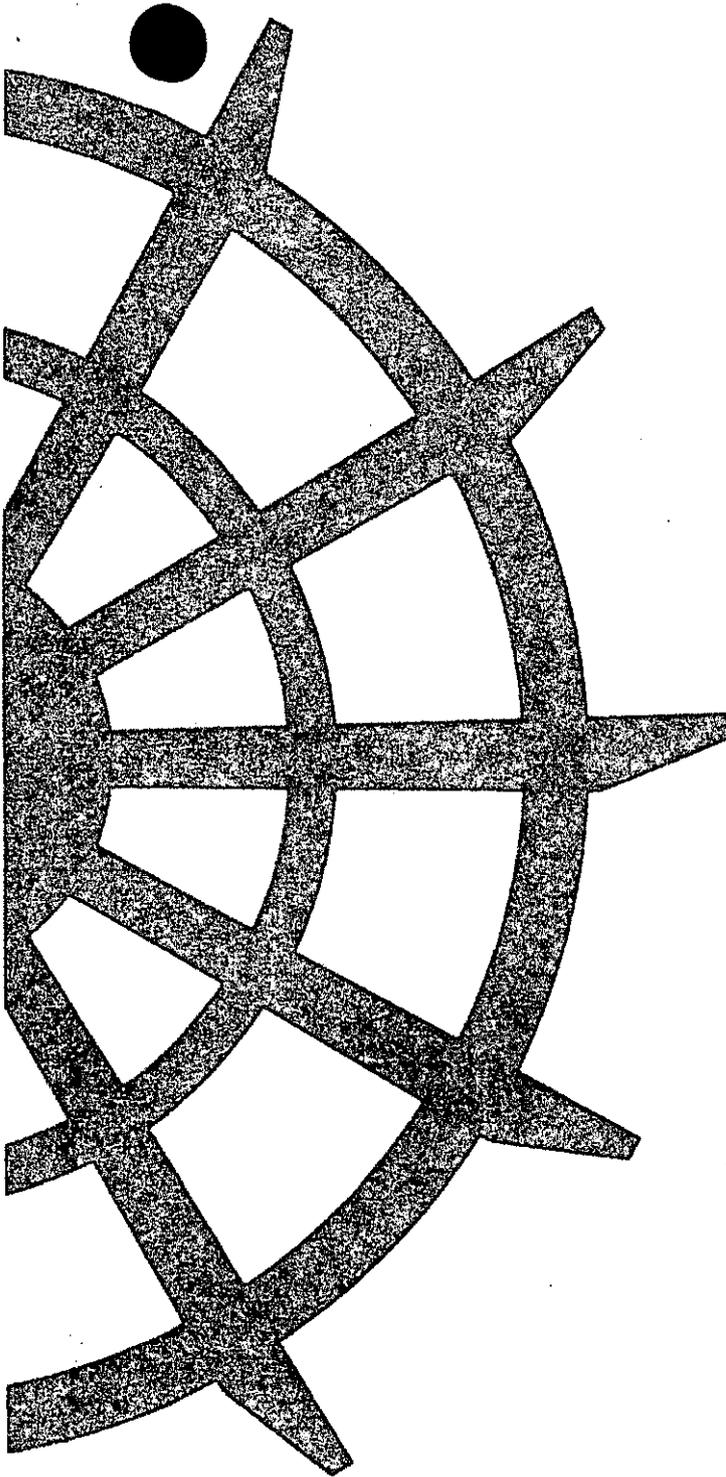
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## The Long View on I-Gaming

- First sites come online 1995.
- Entrepreneurs in emerging jurisdictions now joined by land-based operators.
- Sanctioning governments increase: 85

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Sue Schneider, River City Group  
Sue@RiverCityGroup.com



# Interactive Gaming Update

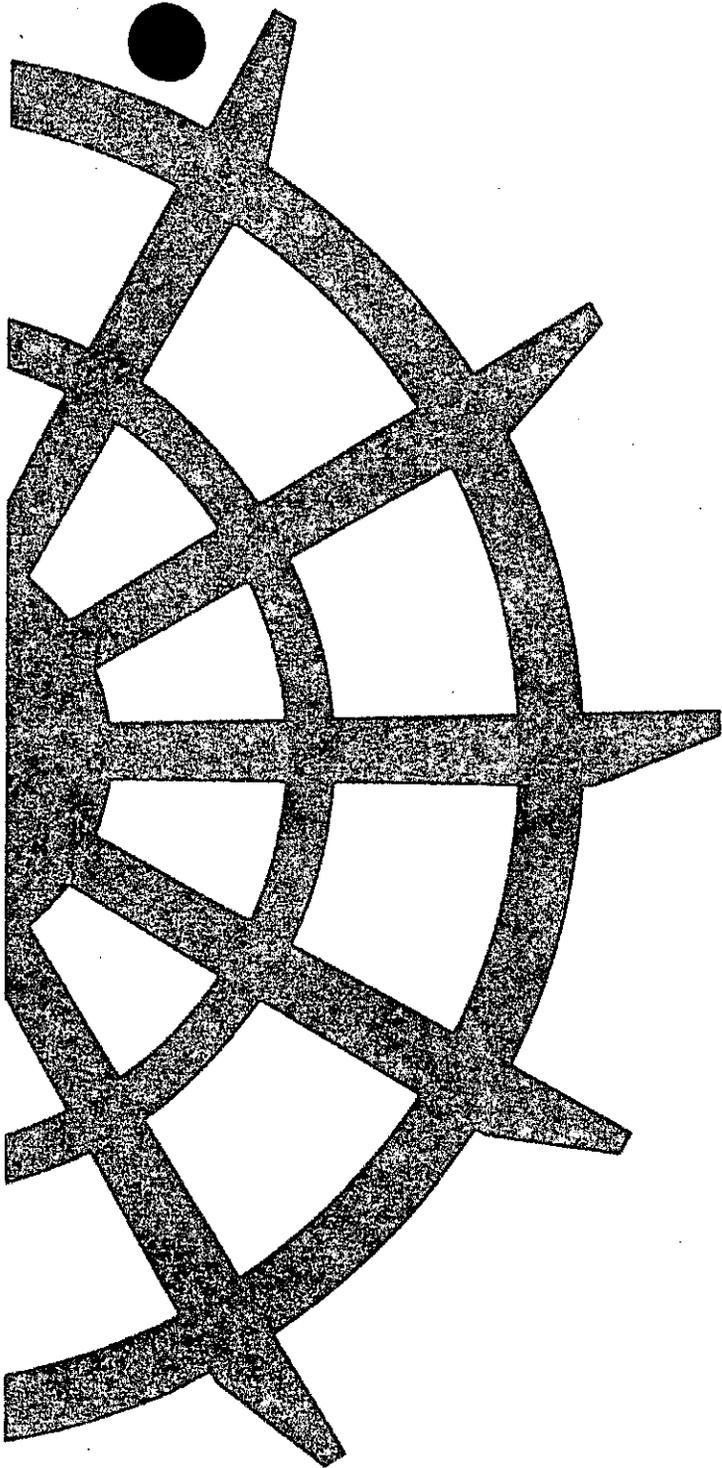
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## Current State of Online Gaming

- Over 300 operating companies or governments.
- # of Internet gaming sites:
  - 700 in 1999
  - 1,400 in 2000
  - 1,800 in 2001

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Sue Schneider, River City Group  
Sue@RiverCityGroup.com



# Interactive Gaming Update

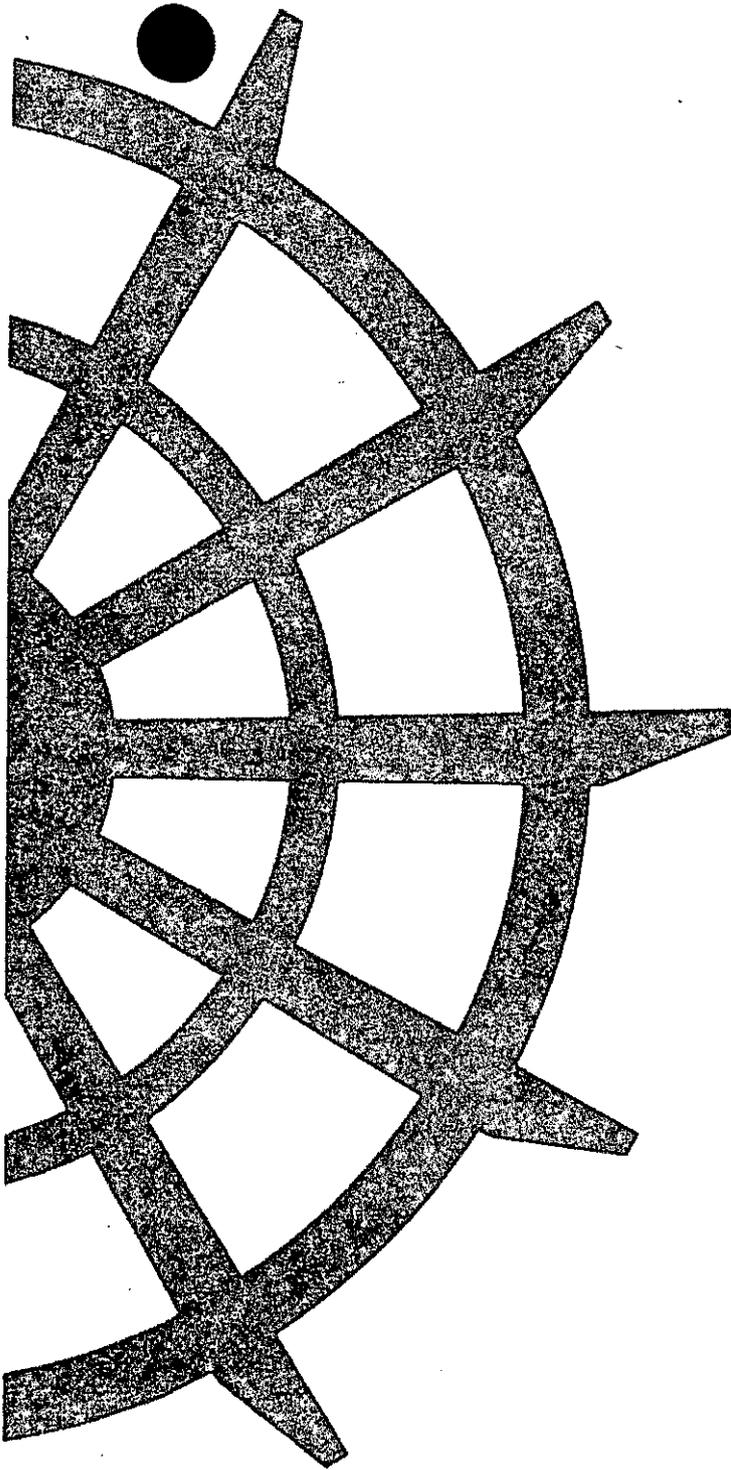
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## Jurisdictional Scorecard

- Development varies by continent.
- Australia - the Early Leader
- The European Approach
- Caribbean/Central American Developments
- North America - Racing and Now Poker?

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Sue Schneider, River City Group  
Sue@RiverCityGroup.com



# Interactive Gaming Update

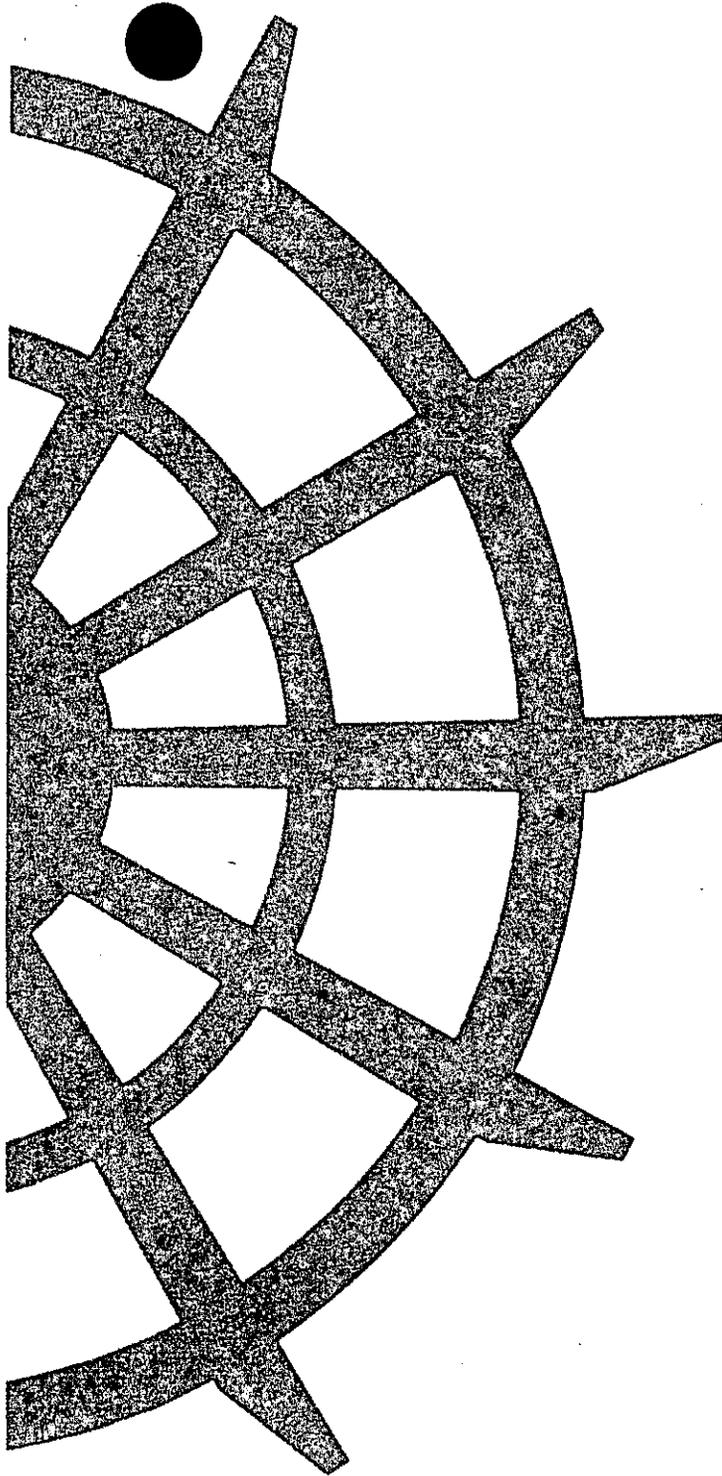
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## US Legal Status

- Proposed US federal prohibition legislation has been attempted since 1997.
- Nevada legislates but is stymied by the US Department of Justice.
- US states pass prohibition bills: Louisiana, Nevada, Michigan, Illinois, South Dakota.
- Certain states adopt interactive race betting: California, Louisiana and others.
- US citizen Jay Cohen is imprisoned for his involvement with a sports book operation.

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Sue Schneider, River City Group  
Sue@RiverCityGroup.com



# Interactive Gaming Update

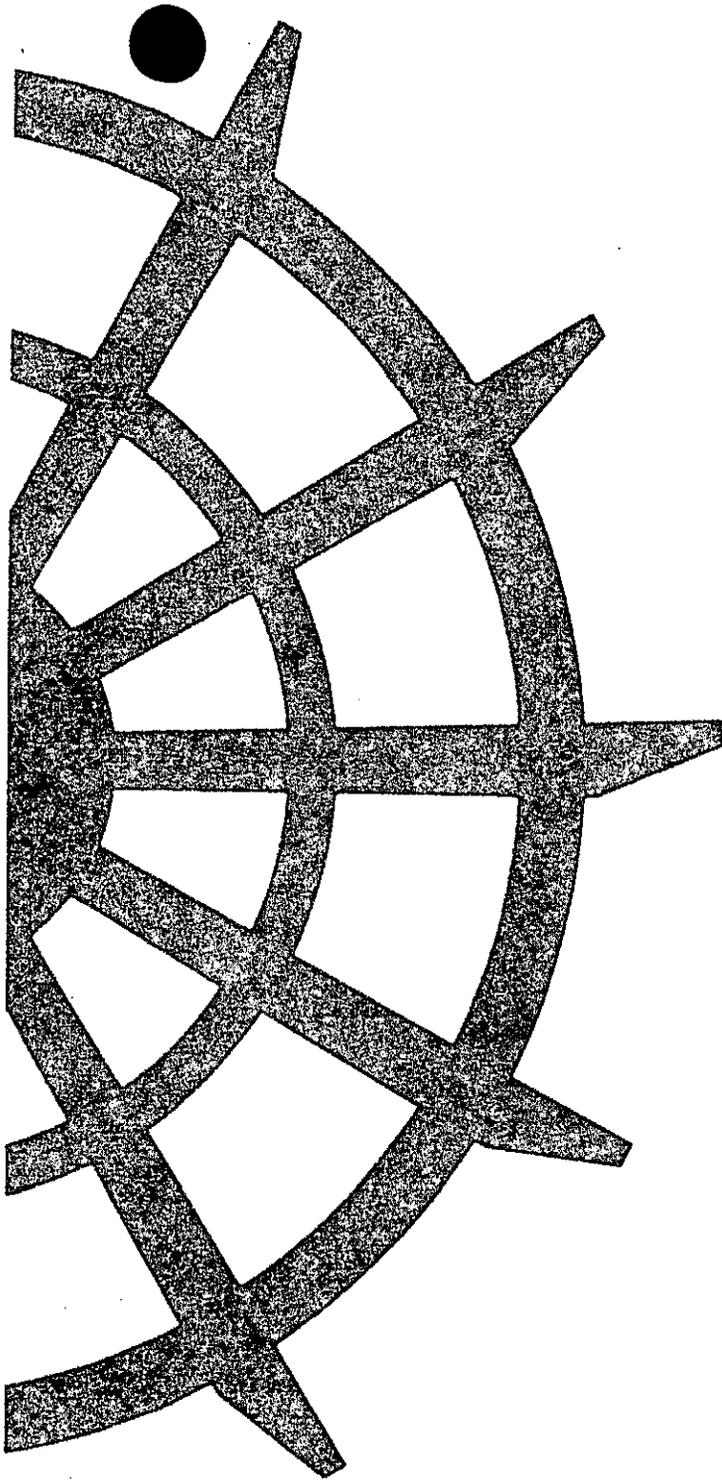
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## The Poker Phenomenon

- 1998 - The first sites launch.
- 2001 - Industry leaders emerge (Party Poker, Poker Stars and Ultimate Bet, etc.)
- 2003 - The industry explodes. WSOP and WPT are major factors.
- 2005: Poker is I-gaming's hottest sector:
  - A \$2 billion a year industry.
  - Nearly 2 million real-money players.
  - More than 200 real-money sites.

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Sue Schneider, River City Group  
Sue@RiverCityGroup.com



# Interactive Gaming Update

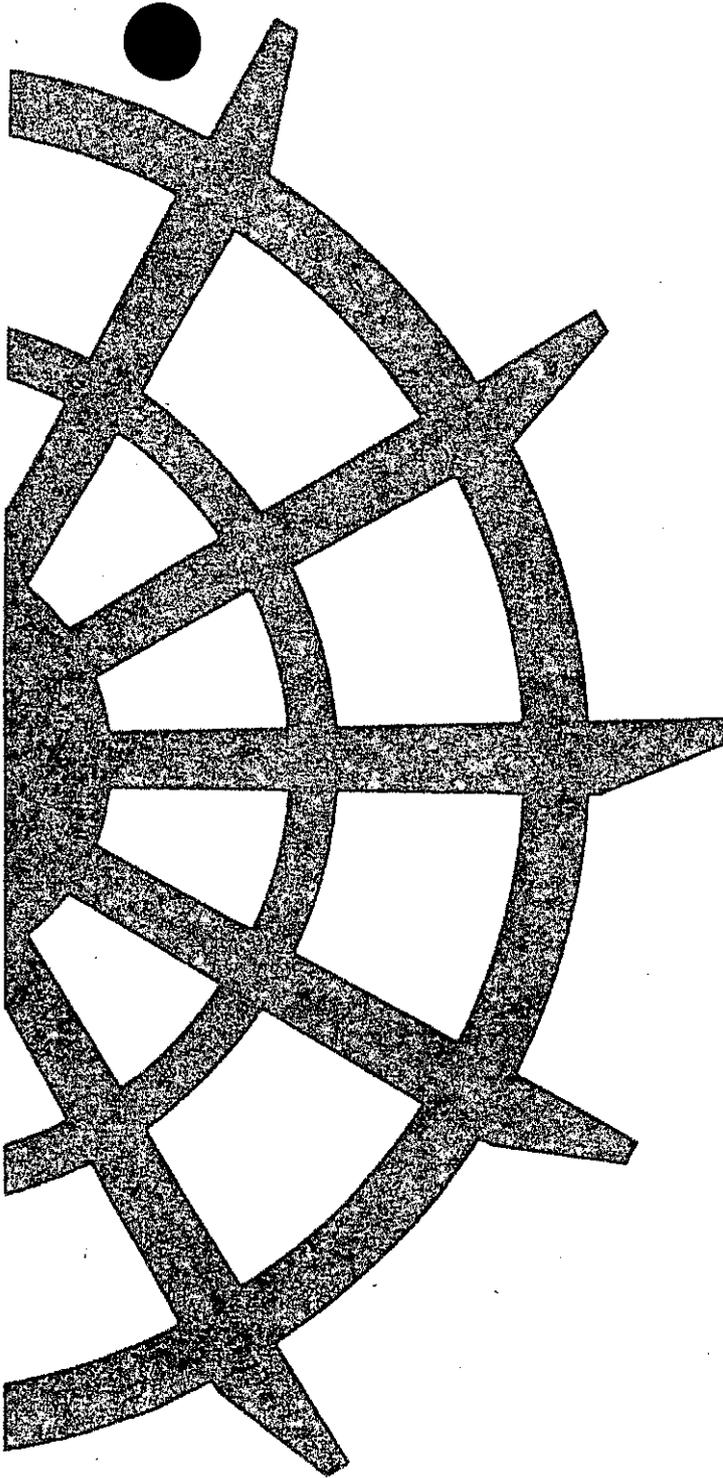
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## Social Responsibility

- The industry must be proactive in addressing underage and problem gambling.
- Technologies for identifying players are improving.
- Responsible gambling controls include:
  - Self exclusion and self-imposed limits.
  - Providing awareness of and access to help for problem gamblers.
  - Exclusion of players who exhibit problem gambling behavior.

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Sue Schneider, River City Group  
Sue@RiverCityGroup.com



# Interactive Gaming Update

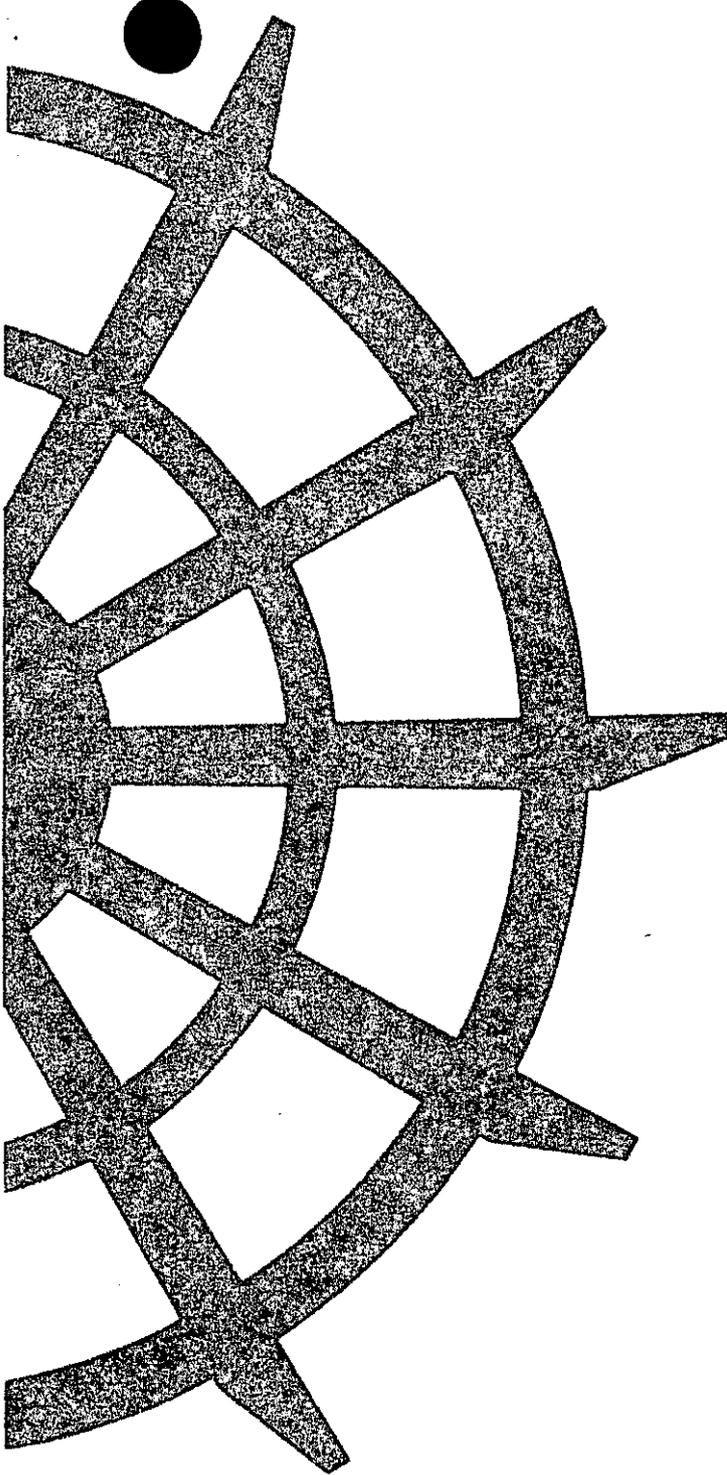
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## Moving Forward

- Progressive governments recognize the benefit of licensing/regulation.
- Player protection is key.
- Revenue enhancements are promising.
- The industry must take social responsibilities.
- Certain tax-sharing must be worked out

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Sue Schneider, River City Group  
Sue@RiverCityGroup.com





RIVER CITY  
GROUP

*The Interactive Gambling Industry Specialists*

[www.RiverCityGroup.com](http://www.RiverCityGroup.com)

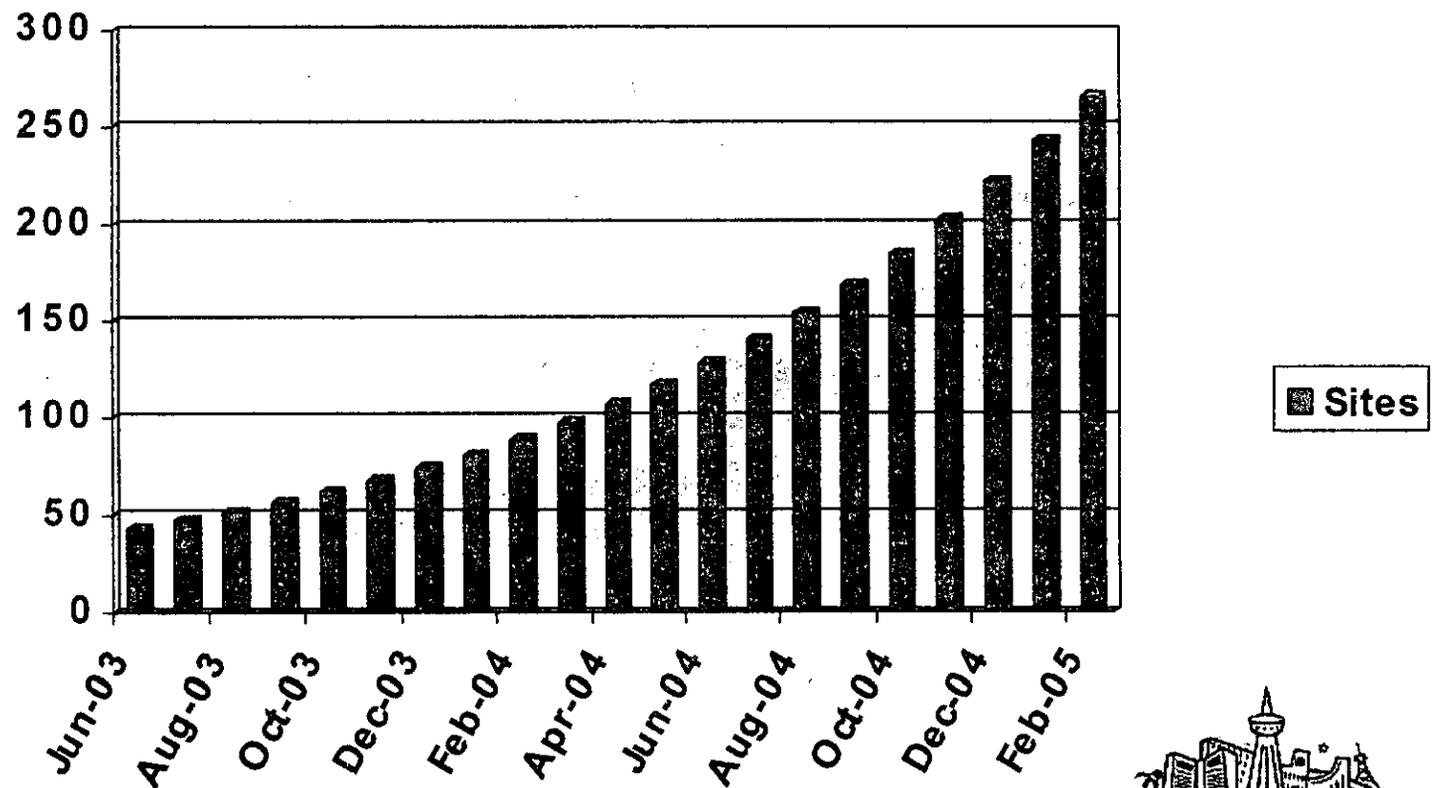
636-946-0820

[Sue@RiverCityGroup.com](mailto:Sue@RiverCityGroup.com)

# Growth in Number of Online Poker Sites

43 Poker Sites in June 2003, 266 Poker Sites in February 2005

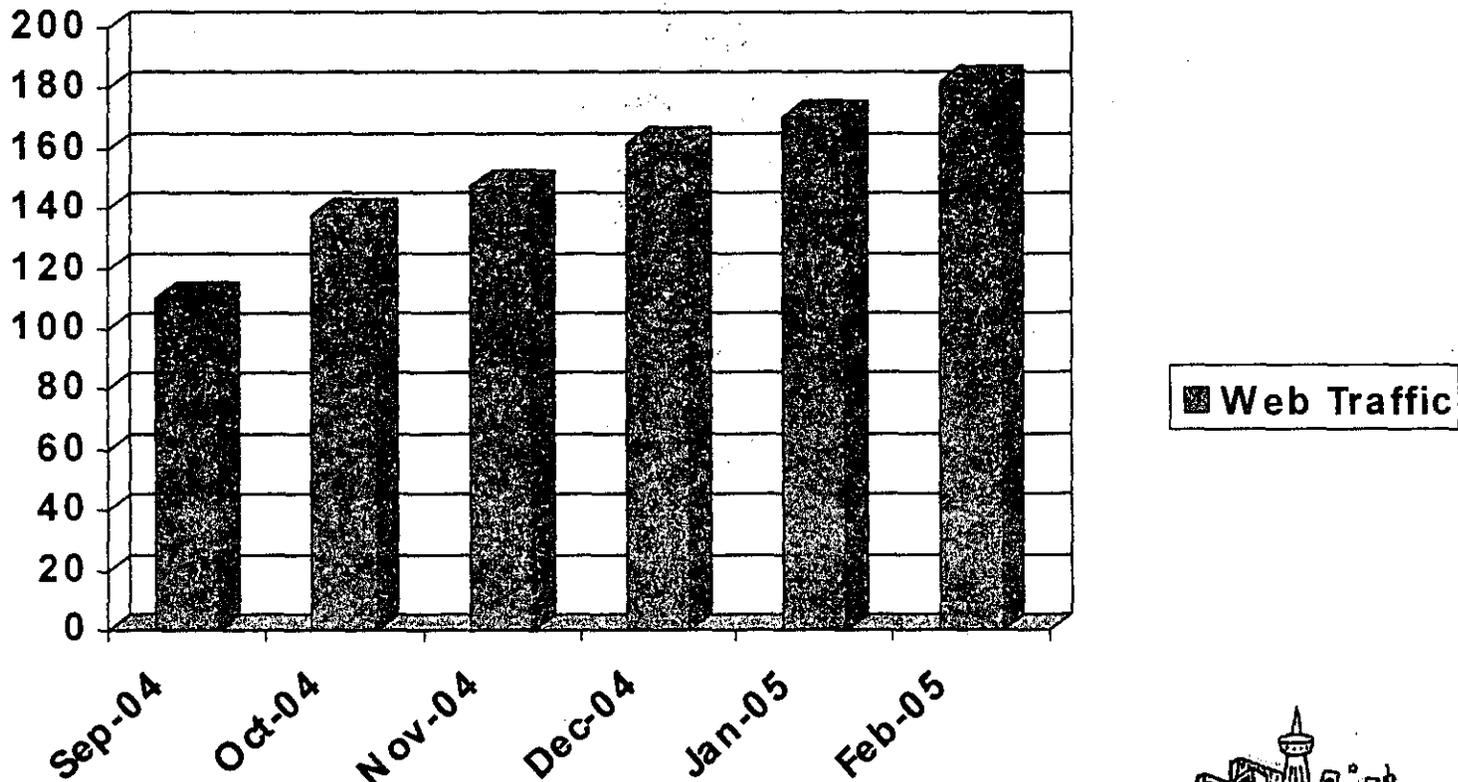
Compounded Monthly Growth Rate of Nearly 10%



Your Guide to Gaming Excitement

# Web Traffic to Online Poker Sites

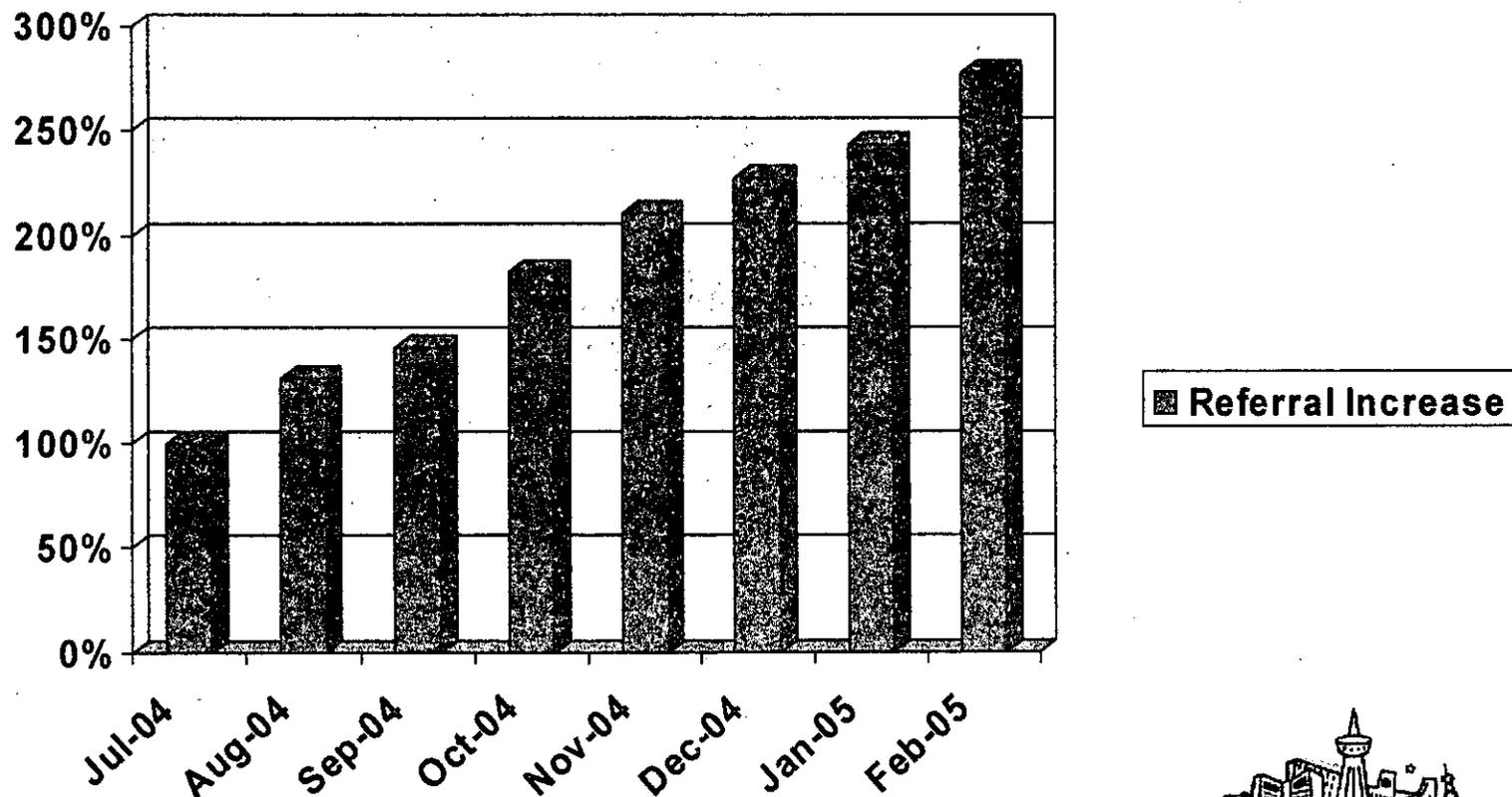
Poker Site Page Views Per Million Web Page Views



Your Guide to Gaming Excitement

# Casino City Poker Site Referral Growth

Monthly % Increase in Referrals from July 2004 Onward



Your Guide to Gaming Excitement

Att #140

# NORTH DAKOTA

# sportingbet Plc

Mr Chairman and Members of the Committee,

Thank you for the opportunity to present to you today in support of the Internet Poker Bill.

## Introduction

My name is Nigel Payne and I am the Chief Executive Officer of Sportingbet plc. Sportingbet has been in the internet gambling business since 1998 and is one of the founders of the industry. Today, we are a publicly quoted company on the London Stock Exchange with a market value of over US\$2bn, we have over 2.3m customers covering most countries in the world. Sportingbet's shareholder register contains household names in both UK and US institutions, such as Fidelity, Merrill Lynch and Goldman Sachs.

With regard to online poker, Sportingbet is the third largest operator in the world completing over one million games of poker per day. To put this into context, during the half hour that this presentation might last, Sportingbet, through its primary brand of Paradise Poker will complete 44,000 games of poker (44,000 "pots off the table"), dealing 440 playing cards per second. Even at these levels however, Sportingbet represents less than one tenth of the overall online poker market.

During my presentation, I hope to address some crucial areas for you to consider both real and perceived. These include: the size, scope and growth of the internet poker industry; the perceptions that confront the industry, including underage gambling, problem gambling, money laundering and collusion; methods that are available to effectively address these issues; what operators would bring to North Dakota in terms of revenue, employment and economic growth, including significant opportunities for the State Bank of North Dakota.

things  
MARKET  
SOLUTIONS  
DAKOTA

## The Poker Market

Let me start by outlining Sportingbet's view of the internet gambling market, focusing specifically on internet poker. In expanding upon our views, I will be referencing from third party independent research conducted by and available from, Investment banks in the City of London and the United States.

Gambling is a big business. The global gambling market is huge and universally enjoyed across the world. Sportingbet believes that in every country in the world today at least some of its citizens will gamble. Dresdner Kleinwort Wasserstein ("Dresdner"), a pan-European Investment Bank, estimates that the global gambling market was worth US\$237bn of gross win (the amount of income retained by the operator) in 2004 and that this will rise to US\$277bn by 2008. The US is comfortably the largest market in the world at US\$73bn, nearly three times larger than its nearest competitor, Japan. Within Europe, the UK is the largest market at US\$12bn.

In the past decade, online gambling has come of age, reaching US\$9.2bn of gross win in 2004. Although this may sound large, it still represents a relatively modest percentage of the whole at just 3.9% of total gambling spend. Market forecasts suggest that this share will increase to 6.5% by 2008 (US\$18.1bn), driven by all products - but most of all by online poker. The main global drivers are the rising level of televised product such as poker tournaments combined with the fast increasing penetration of broadband internet access. Poker will comfortably be the largest single online gambling product by 2008.

Poker's recent phenomenal rise has been driven by numerous factors, including US\$1m prizes and celebrity TV status. The online poker market, though developing fast since 1999, exploded in late 2003, fuelled by Chris MoneyMaker's victory in the World Series of Poker 2003 and the US\$2.3m first prize after qualifying with just US\$40 through an online tournament. Greg Raymer repeated the feat the following year, qualifying online and winning US\$5m. The online poker market more than quadrupled in 2004 to US\$1.4bn.

Poker's rise has been meteoric, though is it this surprising? Steeped in history, poker is the most popular card game across the world's casinos. It is a game of skill that has been played for over 400 years. It has been estimated that over 65 million Americans regularly play poker, with as many as 100 million players worldwide. Research has shown that there are over 16,000 land-based poker tables globally, of which at least 70% are located in North America, mirroring the current online player base.

Third party research from Dresdner estimates that American poker card rooms generated a gross win of US\$851m during 2003. Based on this estimate, land-based poker's global rake for 2003 should be somewhere between US\$1.6bn and US\$1.8bn. In Nevada alone poker revenues increased by 18% in 2004. Based on the prevalence of land-based poker tables and 2004 global casino revenues, Global Betting and Gaming Consultants have estimated that the land-based poker sector generated a gross win of just over US\$1.9bn in 2004 and is expected to rise to approximately US\$2.0bn in 2005.

It is anticipated that this year, poker will become the first gambling product to see its online revenues outstrip that of its land-based equivalent.

Sportingbet believes that it is no exaggeration to describe poker (in particular multi-table tournaments) and the internet as perfect partners. Poker's unique advantage is its ability to combine jackpot prizes, celebrity status, person-to-person and a skill-based quality, not prevalent in bingo, other gaming, and lotteries. In addition, internet poker is non-confrontational, it can be played in the comfort of your own surroundings. It is convenient yet at the same time provides a skill-based intellectual challenge. Perhaps the combination of all of these factors has been one of the reasons for the emergence of a number of ladies now playing online.

The US represented approximately 77% of the global online poker market in 2004, though this is expected to fall to 64% by 2008. Despite representing a falling percentage as other markets expand, the US will dominate the internet poker market for many years to come. Europe is expected to increase its share of the online poker market, rising from 17% in 2004 to 25% in 2008, driven by Western Europe, particularly Scandinavia and the UK.

### **Individual Behaviour**

Let me now turn to individual players. Dresdner estimates that the average number of active online poker players in 2004 was 1.5m. This is forecast to rise nearly five fold to 7.7m players worldwide by 2008, with 4.2m from North America and 2.4m from Europe. Broadband penetration rates are a key driver in determining poker penetration rates, as online poker is not suited to slower dial-up connections.

This volume of online player numbers equates to 0.12% of the world's population and still represents but a fraction of the total poker player numbers, online and offline. Whilst the US has the greatest penetration at the moment at 0.4%, many observers expect the UK to overtake the US in this regard, reaching 1.5% versus 1.3% in the US by 2008. In Scandinavia, online poker is already very popular and Denmark, Sweden, Norway and Finland have the third to the sixth most significant markets.

Individual behaviour and spending patterns are of great interest and are particularly relevant with regard to effective regulation. It is difficult to forecast whether the average spend per customer increases over time as players become increasingly confident or whether it decreases overall as more casual gamblers enter the market. The general consensus is that average online spend per player per annum will fall from US\$762 in 2004 to US\$619 in 2008 as more casual gamers and less affluent nations enter the market. Market research suggests that the average active player plays for under an hour per day and for less than seven hours per week and that the average cost per hour of playing at a \$1.00 table is just \$2.60.

Dakota

- 2000 players

**What Do Operators Want?**

Let me now turn to what operators are looking for. Before outlining this in detail, allow me to explain, briefly, the way the online model works. Sportingbet is effectively a facilitator. We bring together a group of players who wish to play and offer them a trusted and fair game. The funds that customers deposit are safe. The cards are randomly dealt and in our case verified as such independently by Price Waterhouse Coopers every month. Sportingbet earns its income by charging a small commission on each pot – on average 31 cents per game in our last reported quarter.

Respectable operators in the online poker space have a clearly defined set of wishes. Operators recognise the fast growing market dynamics conditions indicated above in which the industry operates. Within this context, operators want:

1. To operate a regulated business
2. Which is enjoyed by the responsible
3. Whilst protecting the vulnerable
4. Seeing the unscrupulous kept away
5. And paying tax

For operators to want anything else is simply self-defeating in the longer term.

} \$10m under the Bill. Reasonable fit.

Regulation is the single biggest issue within the global online poker industry today. Within the US, the lack of regulation makes it difficult if not impossible for operators to achieve their goals. Moreover, the lack of regulation is making issues that the industry is trying to manage (such as underage gambling) more difficult. The US today is something of a paradox. Despite being the largest gambling nation (by some distance), both on and offline, some factions within the US are still attempting to prohibit online poker, based in the main on social and moral reasons. We have a somewhat unusual state of affairs where the activity is unregulated (allowing the unscrupulous to operate freely), yet we see not only significant advertising (indeed we saw poker adverts during the Superbowl this year) but also online sites being covered in detail on prime Saturday night chat shows.

↑ indeed UK legal.

Theoretically, regulation itself does not pose a direct threat, as jurisdictional issues regarding imposition, adjudication and enforcement against online gambling companies are difficult because operators are not incorporated in the US, nor do they have a physical presence here. But this line of argument, and indeed the argument that "we do not want to signal our approval of gambling by being seen to regulate it" in our opinion both miss the point.

Our view is this. Gambling has existed since the dawn of time. The internet as a distribution channel is here to stay. The demand for the product is significant and growing fast. No country has successfully prohibited any online industry. In a world where there are real issues, but where prohibition is almost certainly impossible, proper and effective regulation is the only way forward. It is the socially responsible thing to do – even for those that do not believe in gambling itself. Many countries, importantly including the UK, have embraced this concept. Even those that are against gambling per se. As a general statement, the world, outside of the US, is moving towards a regulated model.

} UK  
policymakers  
+ like  
gambling.

**The Issues**

Let me now turn to the issues often discussed in relation to online poker and comment on how they can be effectively managed. It is generally held that the issues that underpin a reluctance to regulate online poker fall into four main areas. It encourages:

- 1. Under-age gambling
- 2. Excessive gambling
- 3. Money laundering
- 4. Fraud and collusion

Let me first consider under age gambling. In 2001, a New York District Court became concerned about the possibility of tobacco sales being made online to minors. Systems were developed - and approved - to protect minors. One such system, used today by Sportingbet across Europe (and within the USA from this summer) was developed by the US based Aristotle organisation and is called VerifyMe. Aristotle is a leading political technology company in the US. VerifyMe is Patriot Act compliant. Other reputable US organisations are on record supporting this product. The Washington based Child Online Protection Services (C.O.P.S.) website states "There is no system available in America today that utilizes public data in a more effective and comprehensive manner to screen out kids from restricted sites than VerifyMe."

Sportingbet's view is this. Without intruding upon anyone's privacy, it is perfectly possible to screen out minors wherever appropriate. UK regulated operators are obliged, quite rightly, to have such systems. Unverified customers are immediately blocked. Clear, external facing corporate policies are mandatory, as is in-house training, clear procedures and documentation. Whilst without doubt Sportingbet, and others in the industry, are at the early stages of implementation, and we still have a lot of learning to do, the fact is that online models, properly regulated, can give solid protection. Sportingbet has already demonstrated to regulators elsewhere in the world that such systems can and do work effectively.

The alternative, one in which the industry still flourishes but is allowed to remain unregulated, with no protection for minors, surely cannot be the correct approach?

Consider now excessive gambling. In a recent study it was found that an active online poker player plays for less than one hour per day and less than seven hours per week. Per hour, the average player lost \$2.60 at a \$1 table. Clearly these figures are averages and the distribution around these numbers may be high. No evidence, however, was found that online poker is yielding unusually high average spend levels.

Were this not to be the case, however, and were average spend levels to be higher, it must surely be the case that in an unregulated market where there is no control unless it is voluntarily introduced by the operator, the risks to the vulnerable would be greater than in a regulated environment. In a regulated market, the regulator sets the rules.

Sportingbet has developed an online model today that contains a large number of key "know your customer" data points. Who are you? Where do you live? Who do you use to deposit funds? What ISP address and provider do you use? Do credit card clearing houses have issues with your payments? How often do you play? At what time of day? Is your behavioural pattern changing? Does your behaviour fit your demographic profile?

These points and others allow Sportingbet to set behavioural rules according to profile, monitor any activity outside of norms and minimise the risk of any excessive activity, either by frequency of play or spend. If activity goes outside set parameters then we stop any further activity until we have understood the situation further by contacting the customer directly. Given the availability of such procedures, it is difficult to understand why a lack of regulation and by implication the possibility of uncontrolled excessive gambling, can be better than regulation. The point here is that Sportingbet does not deny that problem gambling exists. What we maintain is that by regulating the industry, it can be minimised.

Consider now money laundering and collusion. Just like the excessive gambling argument above, Sportingbet does not believe that there is any evidence that this issue exists within the industry. Indeed in its ruling in November 2005, in a case between Antigua and the US concerning US restrictions in the industry, the World Trade Organisation stated "the US has put forward concerns often associated with Internet Gambling... The Panel concludes that there is no evidence to support this notion and that the US has not justified its prohibition measures....". I should add that the US has appealed this ruling.

A regulated model however can overcome concern. In addition to the "know your customer" ("KYC") profiling mentioned above, operators have procedures which recognise that money laundering is not about winning – it is about moving money. And that collusion in online poker must involve two players in the same game. Sophisticated game analysis is ongoing at all times. Does Mr Y play how he should? Does he seem to play differently when Mr Z is winning? Might he be colluding with him? Do players have the same ISP addresses? Do players play at the same table often? Remember that in the online world the programmes can see every single card and can track behaviour accordingly. In addition to collusion monitoring, all deposit and withdrawal activity is monitored and profiled, both against the "KYC" data and in and of itself. Most important of all, money is only ever returned to source.

Sportingbet is confident that proper regulation can effectively manage these concerns. In this instance, however, it is worth noting the effect that previously proposed US regulation might have had. Within the industry, operators are not allowed to use US banks to acquire customer deposits.

The industry does still however use US bank data, normally through third parties such as VerifyMe, to conduct checks on under age gambling and laundering controls. Were the proposed Federal US legislation last year to have been passed (seeking to ban the use of US financial instruments within the industry), it would have reduced the effectiveness with which operators conduct their control procedures, since it would have removed one method of verifying age (i.e. back to the bank) and laundering checks (i.e. knowing the source). In other words, this would have exactly the opposite effect than that intended.

### **Economic Implications**

Let me now turn to the potential economic implications of regulating the online poker industry in North Dakota. The implications fall into two areas: immediate financial benefits, and the opportunity afforded to the North Dakota bank. Sportingbet believes that the demand for licences from operators, if the regulatory model is passed and the financial consequences are commercially sensible for both parties, will be high.

An operator who took up a licence would bring in technology (servers and bandwidth demands), local employment (technology and other functions), stimulate economic growth (employment, offices, internet bandwidth usage, travel and subsistence needs, licence fees and taxation). Potentially, the income available to the State in this area is significant.

The State Bank of North Dakota presents a further opportunity, which falls into two areas: improved regulation and additional income. The importance of this opportunity should not be underestimated. Let me turn to the additional income stream first. One of the practical difficulties that operators face today in the US market is finding quality bank processing capacity. The offering of the facilities of the North Dakota bank to licensed operators represents a compelling argument for an operator to locate in the State. This is a unique point of differentiation. Not only is this ideal for the operator, but the income stream that could be earned by the bank from such processing could be substantial.

With regard to regulation, Sportingbet believes that by including the State Bank within the process chain, the ability of the regulator and operator to control the regulatory issues through better "know your customer" information would improve the quality of the regulatory regime. North Dakota can use this information to help prevent underage gambling, problem gambling, gambling from "illegal" locations, money laundering and fraud, in a way that no other State can, and generate revenues at the same time. North Dakota is genuinely uniquely situated to introduce this legislation in a truly effective manner.

### **Summary**

Mr Chairman and members of the Committee, thank you for your time this morning. I hope I have been of some help in your deliberations. In closing, please allow me to summarise:

- The global gambling market is huge and expanding fast;
- The US is the single largest country within the market;
- The online gambling market is growing at a faster rate than the overall market;
- Poker is the fastest growing product;
- The internet and poker are perfect partners;

- It is no surprise that internet poker is set to generate more revenue this year than its land based equivalent;
- All the evidence suggests that this is a safe, leisure oriented game of skill where average spend low and no evidence of abuse exists;
- That said, there are real issues in the industry. Minors and the vulnerable must be protected, the unscrupulous must be prevented from operating and proper money laundering controls must be in place;
- The industry is clear in its view that not only can these issues be properly controlled but that the only viable alternative – one of an unregulated market – cannot surely be the right approach;
- Economically the financial implications to North Dakota are significant and the introduction of the State Bank would be a compelling argument to all operators.

Mr Chairman, poker is a US institution. It is part of the US culture and has been successfully exported across the globe. Millions of people enjoy the skill and the challenge of the game every day. With the advancement in technology in recent years, the genuine concerns expressed in the past by US politicians can now be readily overcome. I cannot close without applauding North Dakota for having the courage to address this opportunity.

Sportingbet fully endorses this Bill and encourages you to pass it into law.

↓  
my speech re  
"legit" in  
Washington.

AH #5

**TESTIMONY OF FRANK CATANIA  
BEFORE THE NORTH DAKOTA SENATE JUDICIARY COMMITTEE  
HEARINGS ON HB1509**

**MARCH 8, 2005**

Chairman Traynor and Members of the Committee, thank you for the opportunity to speak here today. I would also like to thank Representative Kasper for having the foresight to introduce legislation regulating and taxing online poker.

This is a bold move by Rep. Jim Kasper and his supporters in the North Dakota legislature. Tens of thousands of people in the U.S. are playing online poker every day. There is no question that online casino gaming is a form of entertainment that is here to stay, and North Dakota has taken a proactive position in looking to protect players, while generating tax revenue for the state.

As background, I am a former Assistant Attorney General and Director of the New Jersey Division of Gaming Enforcement having served in that capacity from 1994 through 1999. Since leaving that position, I have established a consulting business to assist states, foreign governments, and companies establish strict regulations for the oversight of gaming.

Today I am here as an advocate for the regulation of casino style online gaming, that includes online poker and as a representative on the Interactive Gaming Council (IGC), an international non-profit trade association of companies around the globe that are involved with the interactive gaming industry and a leading advocate for the strict regulation of online gaming.

While thinking about my presentation, I arrived at some questions that I believe form the core of this important issue and these questions will be the focus of my presentation this morning.

### *Why regulate Internet poker?*

Society accepts gambling as a form of entertainment and that acceptance comes in various forms, including land based and riverboat casinos, horse racing and lotteries. Forty-eight of our fifty states recognize some form of gambling. Further, prohibition will not work and history proves it.

Without regulation many of the online gaming sites operate in an atmosphere where the only guidelines are those that are self imposed. Players are at risk when there is no regulatory body to hold them accountable. Many jurisdictions such as the Kahnawake Mohawks, the Isle of Man, Alderney and Antigua have adopted regulations for online gaming and have been able to provide players on their licensed sites licensed protections not afforded by sites operating from unregulated jurisdictions.

Trade groups such as the IGC have adopted standards by which their members comply and eCOGRA, located in the United Kingdom, working in conjunction with Price Waterhouse Coopers has made it mandatory that its members comply with generally accepted procedures for online gaming sites. These are actions taken by the industry itself to provide player protections to ensure fair and honest games, protections are in place to combat underage gaming, assistance is available compulsive gamblers.

Estimates as to revenue or rake from online poker sites as of January 2005 are approximately \$5.2 million dollars per day. A majority of the players come from the United States and not a penny of tax revenues is going to any of the states.

### *States Rights*

Gambling is one of the fastest growing forms of entertainment in the world. The United States policy with regard to online gaming continues to restrict some of the worlds most respected casino gaming companies from being competitive in the industry. If gaming is lawful, and we all must agree gaming is a states rights issue that must be left to the individual states, the means of distribution or the medium by which a player participates in a game should not affect its lawfulness. North Dakota should be allowed to choose its legislative and regulatory direction.

Each State has the right to decide whether or not it wants to license and regulate online gaming. We need only look at those states involved in gaming; they have a proven track record of their ability to effectively and efficiently regulate gaming. Technology is now available that could be

used to exclude players from those states that opt not to participate in online gaming. The decision by the states deciding not to participate must be respected by the states that decide to regulate as well as by all their licensees.

Diverse regulations in one or more states that decide to legalize online gaming could be addressed in the same way legislators have addressed other interstate policy issues. Initially the state with the strictest regulations would dictate policy since casino companies that operate in multiple jurisdictions must operate in conformance to the highest standards of the regulations of the various licensing jurisdiction within which it operates.

### ***How can online poker be regulated?***

#### ***Suitability and Licensing***

Online poker regulation must be based on the same principals as the regulations established for traditional, brick and mortar casinos. Put simply, regulators must have the power to ensure honesty, integrity and the financial security of operators and to oversee the integrity of the games being offered.

In any traditional gaming jurisdiction, a person or company cannot receive a license to operate a casino unless they undergo an intensive background investigation, and the casino regulators find them to possess the highest degree of good character, honesty and integrity. Those applying for licenses in North Dakota for an online poker license should be subject to extensive background investigations. The proof is evident in the Internet gaming regulations already established in several countries throughout the world.

Any perceived suspicion and mistrust of Internet gambling that exists must be countered by strict regulations allowing only those with impeccable suitability to be licensed, the same requirements as established for traditional casino licensing. There should be no difference in the licensing process between a traditional gaming license and a poker gaming license.

North Dakota gaming regulators would be able to ensure consumers that online poker operators are legitimate, that operators offer fair and honest games and that they have the financial stability to insure that winnings are paid. Gaming regulators would make continuous checks to assure that the online poker operators are offering fair games, they remain financially stable and that controls are in place so that customer's financial information is not misused.

### *Prevention of minors gambling*

Significant resources are devoted to preventing minors from gambling at the traditional casinos. However, with all the resources and the physical presence of the minor no gaming jurisdiction could prevent gambling by minors 100% of the time. *Same as in online poker*

Players should not be allowed to play until they are registered. This will help limit accessibility to any under-age players. Players must be required to submit proof of their identity before they could wager more than a minimal amount. The identification must have a player's identity, age and residence. Hard proof such as a driver's license, a passport or voter's registration would suffice and should be required.

Once the player's identification has been established, a personal identification number to access the site should be mailed to the player at the address provided during the registration process. This is cumbersome and time consuming, but it is necessary if we are to limit accessibility to minors. There should be an identity check every time a player signs on to play and a player should not be allowed more than one account.

In addition, there should also be an accessible link to a reputable filtering program, such as the Internet Content Rating Association (ICRA) to enable computer users to prevent access by minors.

### *Problem Gambling Issues*

Players must be able to; (1) select the duration of play for each session; (2) select the number of sessions during a specific time period such as daily, weekly or monthly; (3) access information with regard to the duration of each session; and (4) initiate a break during each session.

Players should also be able to establish loss limits. Those limits could be daily, weekly or monthly. Once the player has established the loss limit he would not be able to change that limit without some type of cooling off period, which could be any number of days.

Players must be afforded the opportunity to exclude themselves by request or linking exclusion to established loss limits. Some jurisdictions also allow a third party such as a relative to request exclusion of a player. Once excluded there must be a procedure to be reinstated that has a specified time period.

The gaming sites should provide information that gambling is addictive and readily accessible links to reputable compulsive gambling sites.

#### *Advertising*

An advertising code of practice should be considered. Players should never be given a false expectation of winning. Operators should not be allowed to induce players to continuing playing, whether it is during a session, when attempting to end a session or when the player wins or loses.

#### *Monitoring and Fraud Protection*

With real time auditing and fraud protection software operators should be able to provide the regulator or the player a complete record of play upon request. The record could easily provide the number of plays, duration of play, the number of wins, the number of losses, the date of play, the amount of each wager and all the details the operator has about a particular player. The online poker operator could provide more information about a player either to the player or regulator than a traditional brick and mortar casino.

In my opinion Internet gaming could be more effectively regulated than the traditional brick and mortar casinos. Real time auditing reports are more efficient than the traditional casino auditing. However, outside auditors would still be required, the same as is traditional casinos. This is particularly important for the state to collect the tax revenue due.

Regulation such as is being proposed is the only logical answer to provide trust and comfort to the player, attracting him away from under regulated or unregulated sites. It is possible to develop an effective regulatory control system, based upon the existing type of traditional casino regulation with suitability and general accepted operating procedures.

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*Frank Catania, an attorney, is a principal in Catania Consulting Group, Inc. of New Jersey, a consulting firm with extensive experience in gaming issues. He has a particular expertise in gaming compliance and has been a staunch supporter of regulating Internet gaming. He is a former Assistant Attorney General and Director of the New Jersey Division of Gaming Enforcement (DGE). He served as the chair and vice chair of the International Association of Gaming Regulators (IAGR) and was a co-founder and past chairman of the Forum of American Casino Regulators (FACR). He is a co-founder and past President of the International Masters of Gaming Law (IMGL), a non-profit association of gaming attorneys and regulators dedicated to education and advancement of international gaming law.*

*Prior to accepting his appointment as Director of the DGE, he served in the New Jersey General Assembly as Deputy Speaker. He has been published on a wide variety of casino gaming and government-related topics in several national publications, regional newspapers, and trade publications. He is a graduate of Rutgers College and received his JD from Seton Hall University Law School.*

AH #6

Presentation of Patrick T. O'Brien

Mr. Chairman and members of the Committee.

Thank you for the opportunity to speak today in support of the bill to legalize and regulate live Internet poker.

Introduction

My name is Patrick O'Brien and I am an attorney with the law firm of Greenberg Traurig. Greenberg Traurig is among the 10 largest law firms in the United States with offices in 24 locations throughout the world. My office is in Fort Lauderdale, Florida, and the primary focus of my practice is Internet gaming. My clients include the operators of Internet sportsbooks, casinos and poker sites, banks and other financial institutions which process Internet gaming transactions, data processing companies which service the industry, media outlets which advertise for the industry and hedge funds which invest in the industry.

Prior to becoming an attorney, I was a Special Agent with the United States Customs Service for 26 years. I retired from the position of Special Agent in Charge of Customs in Miami, where our primary concerns were drug smuggling and money laundering. So, when I speak to you today, I speak not only as an attorney experienced in Internet gaming law, but as a former federal agent with a lifetime of experience in fighting money laundering and other crimes.

From those perspectives, I will address two federal issues which might concern you. They are the perceived risk of money laundering associated with Internet gambling; and the Wire Act, which is the federal statute used to prosecute Internet sportsbooks operating offshore.

Money Laundering

When the United States Congress first started addressing the issue of Internet gambling, one of its primary concerns was the perception that Internet gambling could serve as a vehicle for money laundering. This concern has abated over the years, and very few legislators even allude to the issue any longer. Nevertheless, I would like to set your minds at ease and assure you that Internet gaming does not present a money laundering risk.

Money laundering is the process through which the proceeds of criminal activities are cleansed, and brought into legitimate commerce. For instance, the 5's, 10's and 20's from street drug sales may be converted into investment capital for starting a new business. This laundering process is divided into three stages: placement, layering and integration.

### Placement

The placement stage involves taking the dirty money and placing it into legitimate streams of commerce. That is, getting those 5's, 10's and 20's into a bank account. At one time that may have been as easy as carrying a cardboard box of cash to the bank. But times have changed, and powerful money laundering laws and strict regulations of financial institutions have made the placement stage extremely difficult for the money launderers. Internet gaming does not make it any easier. There is no way to use the Internet for the placement stage, because you cannot put cash into a computer. Most of the money that is used for Internet gambling comes from banks, either through the use of credit cards issued by the banks, debit cards, ACH transactions, wire transfers or third party processors, such as Pay Pal or Netteller. This is money that is already in the legitimate stream of commerce, and has already passed through the rigorous safeguards imposed by government agencies and financial institutions. The only way that actual cash can be deposited into an Internet gambling account is through use of money remitters such as Western Union. But here again, the Government has imposed very strict anti-money laundering controls on such money services businesses. The Internet gaming companies might be located offshore, but the funds of U.S. players originate in the United States and must pass through the safeguards established in the United States. So, there is no real risk of placement.

### Layering

The next stage of the money laundering process is layering, where funds which have been placed in legitimate financial systems are passed from one institution to another, usually in different countries to insulate the owners from the underlying criminal activities, and to make it more difficult for authorities to trace the funds. This is a relatively easy process for the launderers once they have managed to get the funds into the financial system, and they merely use wires or checks to move the funds from place to place, layer upon layer. Internet gaming would serve no purpose in this part of the process.

### Integration

The final stage of the money laundering process is the integration stage, where the laundered funds are integrated into the apparently legitimate accounts or businesses of the criminals. This is the final destination so to speak, and this is where Internet gaming could conceivably come into play. Under a theory of "mirror betting" a person could bet on both sides of an event, such as the Super Bowl, be assured of winning one of his bets and then claim the funds received as gambling winnings. Frankly, I was never very impressed by this theory. First of all, the launderers have to get the money into the system, which they cannot do with Internet gambling. Then when they receive the payouts on the other end, they have to try to avoid the scrutiny that comes with receiving large deposits from the foreign financial institutions used by Internet operators. Moreover, if their "winnings" are ever questioned, they would then have to explain where they got the money to bet in the first place.

Most importantly of all, none of this would work in the system being contemplated in North Dakota. There would be strict Know Your Customer (KYC) and other anti-money laundering procedures in place, the transactions would be monitored, and conceivably pass through a single financial institution, the Bank of North Dakota, where they would be subject to the strictest scrutiny. Finally, we are talking here not of betting on the Super Bowl, but of playing poker, and in poker, you cannot bet both sides of a game, you are playing with many players, and must beat them all to win. The monitoring processes installed to prevent collusion in the games would also prevent the kind of collusion necessary for money laundering.

Let me assure you, that Internet poker is about the least attractive vehicle for money laundering that one could conceive. There are numerous ways for criminals to launder money, Internet poker is not one of them.

### The Wire Act

Since arriving here, I have heard a lot of concern about the U.S. Department of Justice and its position that operating Internet poker sites within the state would violate the federal Wire Act (18 U.S.C. § 1084). This is simply not true. The Supreme Court has established the rules of statutory construction, and if the statutory language is clear and unambiguous, then you look no further and follow the language of the statute. The Wire Act makes it a crime to send or receive wagers *on sporting events or contests*. Sporting events are football, baseball, basketball, hockey, golf, tennis or whatever, but certainly not poker. Some may argue that poker is a game of skill and others may argue that it is a game of chance, but no one is asserting that it is a sporting event.

If there were some doubt as to the meaning of the statute, and I don't think there is, the courts turn to case law and the legislative intent of Congress. The most recent case dealing with the issue was In re: MasterCard International, a 2001 civil RICO case, which hinged on the applicability of the Wire Act to non-sports Internet casino gambling. 2001 WL 197834 (E.D.LA.) The plaintiffs contended that the Wire Act applied to casino gaming and the defendants argued that it did not. I will now read what the court had to say on the issue, and note, that I said the court, because it is the courts which interpret statutes, not I, not the Department of Justice, but the courts. And in this case the courts said:

...a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest. Both the rule and the exception to the rule expressly qualify the nature of the gambling activity as that related to a "sporting event or contest." 18 U.S.C. §§ 1084(a) & (b). A reading of the caselaw leads to the same conclusion. [three citations].

As the plain language of the statute and case law interpreting the statute are clear, there is no need to look to the legislative history of the Act as argued by plaintiffs. See In re Abbott Laboratories, 51 F.3d 524, 528 (5th Cir. 1995). However, even a

summary glance at the recent legislative history of internet gambling legislation reinforces the Court's determination...

The court then discusses the attempts over the previous five years to enact federal legislation to amend the Wire Act to cover non-sports Internet gambling, attempts which did not succeed, because Congress could not agree on whether it wanted to prohibit Internet gambling, and if so, what forms would be prohibited and what would be permitted.

The court continues its consideration of the issue, stating:

As to the legislative intent at the time the Wire Act was enacted, the House Judiciary Committee Chairman explained that "this particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events." See 107 Cong. Rec. 16533 (Aug. 21, 1961).

The court then concludes by stating:

Comparing the face of the Wire Act and the history surrounding its enactment with the recently proposed legislation, it becomes more certain that the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests.

The case was appealed and the Fifth Circuit Court of Appeals upheld the ruling, stating:

We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion. In Re: MasterCard Int'l, 313 F.3d 257, 262 5<sup>th</sup> Cir. 2002).

What more can be said – this is the law, as enacted by Congress and interpreted by the courts, the desires and opinion of the Department of Justice notwithstanding.

#### Conclusion

In closing I would like to say that you have a unique opportunity with a thriving new industry looking for a home where it can function legitimately. North Dakota is uniquely positioned to take advantage of that opportunity, because it is the only state in the Union which owns its own bank, a bank that can serve an important role in addressing the threats of underage and problem gambling, and the money laundering risk, as small as it is. Moreover, the Bank is in a position to earn as much revenue in transaction fees, if it chooses to go that way, than the state will generate through its taxes. However, that window of opportunity is small, and if North Dakota does not act, there is little doubt that some day soon some other state will take the initiative, and the opportunity will be lost.

AH #7

**Three Issues Regarding Online Poker:  
Legality, Congressional Efforts  
&  
Poker is a Game of Skill**

By Allyn Jaffrey Shulman  
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Mr. Chairman and Members of the committee:

Thanks you for the opportunity to testify before you. Having been a courtroom attorney, practicing criminal defense for over 20 years, my expertise lies in the area of complex legal analysis, issues of constitutional magnitude, police and judicial misconduct and contempt of court. I am widely published and have lectured all over California teaching other attorneys the fine points of complex litigation, motions, writs and appeals. I am an expert in the area of the legality of online poker, having spent years analyzing every possible federal statute that might apply to technology that was not in effect when the statutes were passed. A number of years ago, I published my prediction that the 1961 Wire Act would be found NOT to apply to online poker. This prediction was based upon 20 years of experience analyzing statutes; the Wire Act will be discussed below.

Additionally, the Shulman family owns *Card Player Magazine*, the leading poker media in the United States for the last 18 years, which comes out every two weeks. I write the cover stories for the magazine, which are in-depth stories about the pros who successfully play poker for a living. We also own *Card Player Europe*, the European version of the American Magazine and [www.cardplayer.com](http://www.cardplayer.com), a free website that has everything related to poker from an odds calculator to legal analysis of proposed legislation, to articles on how to play, with over 30,000 visitors daily. We send out a bi-weekly newsletter to 130,000 opt-in subscribers who want to learn the fine points of poker. We have regular polls and questionnaires in order to keep our finger on the pulse of the poker community.

Today I will address three related topics:

- 1) The legality of online poker (I.e. Federal legislation relating to online poker, including the 1961 Wire Act, the Anti-Gambling Act, and the R.I.C.O. Act),

- 2) Failed efforts by Congress to proscribe online poker since 1995, and
- 3) I will discuss and demonstrate how poker is a game of skill.

## **1) The Legality of Online Poker**

There currently exists no federal law banning a state from passing legislation regarding online poker. Since the first online casino opened its 'virtual' doors in 1995, federal lawmakers have proposed legislation to proscribe online poker each and every year, with no success. If such law already existed, there would be no need to introduce prohibitive legislation.

In 1996, the 104th Congress created the National Gambling Impact and Policy Commission (Public Law 104-169), whose purpose was to conduct a comprehensive study of the social and economic impacts of gambling in the United States. In 1999, the Commission recommended that Congress pass legislation and develop enforcement strategies affecting Internet Service Providers. Again, if such prohibitions were already in place, such legislation would be superfluous.

It has erroneously been suggested that there are three federal laws that prohibit online poker.

### **The Anti-Gambling Act 18 U.S.C. §1955**

Federal Code section 18 USCS § 1955 (2003) prohibits illegal gambling where such gambling *is a violation of law in the state where it is operating*. By the words of this statute, there is no federal violation as long as the state sanctions online poker.

### **The "RICO" Act 18 U.S.C. §§ 1961-68**

Similar to the Anti-Gambling Act, a violation of Rico requires a crime "chargeable under State law and punishable by imprisonment for more than one year." This would have no application in North Dakota once legislation was passed.

### **The Wire Act 18 U.S.C. § 1084**

Years ago I predicted that the 1961 Wire Act would not be found to speak to online poker. The reason is simple. There is a recognized, time worn format for analyzing a statute. First, we look to see if the

words in the statute are clear and unambiguous. If the words are not clear, we move on to the legislative history, then we look at past construction of the statute, case law on point and finally, proposed amendments to the statute. What we find with regard to the Wire Act is as follows:

- 1) The **WORDS** of the statute specifically prohibit SPORTS BETTING and nothing more.
- 2) The **LEGISLATIVE HISTORY** indicates the statute was aimed at organized crime, specifically in the area of sports betting.
- 3) **CASE LAW** construes the statute as applying to sports betting.
- 4) The only **CASE ON POINT** to address the issue specifically found that the Wire Act does not apply to online poker; and
- 5) Recent **PROPOSED AMENDMENTS** to the Wire Act demonstrate that legislators do not believe that the statute prohibits online poker.

**WIRE ACT TEXT:** Title 18 USCS section 1084 (The Wire Act) speaks to the transmission of wagering information. Congress enacted this section as part of a series of legislation supporting a federal policy against organized racketeering.

Subsection (a) of section 1084 states in relevant part:

"(w)hoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any SPORTING EVENT OR CONTEST, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both."

**WORDS:** The operative words of the statute are "SPORTING EVENT OR CONTEST". When we consider what activity the statute prohibits by its clear language, the plain words state that it prohibits certain activities relating to a SPORTING EVENT OR CONTEST.

When the plain language of the statute and case law interpreting the statute are clear, there is no need to go to the second step, which is to

look to the legislative history of the Act. (*In re Abbott Laboratories*, 51 F.3d 524, 528 (5th Cir. 1995).

**LEGISLATIVE HISTORY:** If we look to the legislative INTENT and UNDERSTANDING at the time the Wire Act was enacted, the House Judiciary Committed Chairman explained, "This particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events." See 107 Cong. Rec. 16533 (Aug. 21, 1961).

**GENERAL CASE LAW:** Next, courts have already construed the statute as requiring a *sports* event. See *United States v. Kaczowski* 114 F. Supp. 2d 143, 153(W.D. N.Y. 2000) (Wire Act "prohibits ... placing of bets or wagers on any sporting event or contest"); *U.S. v. Marder* 474 F.2d 1192, 1194 (5th Cir. 1973) (first element of statute satisfied when government proves wagering information "relative to sporting events").

**CASE ON POINT:** Finally, there has been a judicial determination regarding the precise question addressed herein. In the case of *In Re Mastercard International*, decided on February 23, 2001, the Honorable Judge Stanwood R. Duval, Jr. was faced with whether the Wire Act applied to online poker. The suit was brought by deadbeats who didn't want to pay their gambling debts so they brought suit against credit card companies alleging the credit card companies violated the Wire Act by allowing them to use the credit card to put money online at a poker site.

The judge analyzed the statute precisely as I have here and he concluded that the Wire Act only prohibited wagering on SPORTS EVENTS. "Comparing the face of the Wire Act and the history surrounding its enactment with the recently proposed legislation, it becomes more certain that the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests." (Id. 132 F. Supp.2d 468, 482.) In 2002, the U.S. Circuit Court of Appeals in Louisiana affirmed the lower court's ruling.

**PROPOSED AMENDMENTS:** Sine 1995, federal legislators have introduced amendments to the Wire Act in order to include poker. No such amendments would be contemplated if the Wire Act applied to online poker.

In sum, The Wire Act does not regulate on line poker playing because the WORDS of the statute specifically prohibit only sports betting, the LEGISLATIVE HISTORY indicates the statute was aimed at organized crime (specifically in the area of sports betting), CASE LAW construes

the statute as applying to sports betting, the only CASE ON POINT to address the issue specifically found that the Wire Act does not apply to online gambling, and PROPOSED AMENDMENTS to the Wire Act demonstrate that legislators do not believe that the statute prohibits online poker.

### **The Tenth Amendment**

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Laws relating to the health and welfare of its citizens usually fall within the purview of state law. Almost every state has some form of legal gambling, be it a casino, lottery, video, lottery terminal, horse wagering, bingo, or some other form of gambling. Traditionally, the federal government has stayed out of the gambling arena and left its regulation to the states. A respected Congressional Leader, House Majority Whip Tom Delay announced his opposition to proposed legislation regarding Internet gaming for fear that the legislation would diminish state's rights.

### **The Position of the Federal Government**

There is no doubt that both the Clinton and the Bush administrations take the *position* that online poker is illegal. They allude to the Wire Act and other federal laws, but upon careful analysis not one legal expert agrees. Remember, since 1995 when the first online casino began operating, there has not been one single judicial ruling that online poker playing violates *any* federal law whatsoever; quite the contrary. The only judicial ruling available clearly holds that the Wire Act clearly speaks to sports betting, and NOT poker playing.

## **2) Efforts Made By Congress to Proscribe Online Poker**

In 1995, there were about 35 Internet gambling sites. The most conservative estimate is that there are over 1800 sites today. A recent study estimates that whereas global Internet gambling revenues were \$2.2 billion in 2002, \$5 billion in 2003, that figure will reach \$12.6 billion in 2006.

Here are some of the noteworthy efforts made on Capitol Hill since 1995 affecting Internet gambling.

### **1995**

Senator Jon Kyl first circulated proposed legislation that would imprison the online gambler, however, the 1995 Crime Prevention Act was so

broad it was unfeasible by all accounts and died in committee without ever being voted upon.

### **1996**

In 1996, the 104<sup>th</sup> Congress created the National Gambling Impact and Policy Commission in 1996. (Public Law 104-169) The stated purpose of the Federal Commission was to conduct a comprehensive study of the social and economic impacts of gambling in the United States. The Commission recommended that Congress pass legislation and develop enforcement strategies affecting Internet Service Providers, credit card providers, money transfer agencies, makers of wireless communications systems, and banks. (Congress did not complete this study until 1999!)

### **1997**

Sen. Jon Kyl, introduced S 474 (Internet Gambling Prohibition Act of 1997) to the 105th Senate on March 19, 1997. S 474 was a version of his 1995 proposed legislation and attempted to ban all Internet gambling that the 1961 Wire Act did not cover. Internet Gambling site operators and bettors alike would be subject to fines. Further, S 474 would have allowed a state attorney general to issue a restraining order against ISPs that allowed the transmission of bets, wagers, or related gambling information. S 474 passed 90 to 10.

The Goodlatte bill (HR 2380) was introduced to the 105th House of Representatives on September 3, 1997 as the companion bill to S 474. HR 2380 proposed the same general restrictions and penalties as S 474, but never made it out of House Committee on the Judiciary and Congress adjourned before the bill was voted upon.

### **1999**

Sen. Kyl and Rep. Goodlatte tried again to introduce Internet gambling legislation in 1999 with the 106th Congress. Sen. Jon Kyl introduced S 692 on March 23, 1999. S 692 was 28 pages long, with a myriad of exceptions and immunities not included in the 1997 bill. This bill did not criminalize internet gambling for the individual bettor. It received full Senate approval, with an amendment which was approved on November 19, 1999.

Rep. Bob Goodlatte introduced the companion bill, HR 3125 on October 21, 1999. The hefty bill was 37 pages long; it was full of exemptions. Although it had a substantial following, it failed by a margin of 25 votes. Although a motion to reconsider passed without objection, Congress adjourned before it was re-introduced.

### **2000**

Representatives Jim Leach and John LaFalce introduced HR 4419 (also known as the Internet Gambling Funding Prohibition Act) to the 106th

House of Representatives on May 10, 2000. HR 4419 prohibited the use of checks, credit cards, and electronic fund transfers for Internet Gambling. The bill was immediately submitted to the House Committee on Banking and Financial Services and arguments were heard June 20, 2000. After considerable debate regarding which amendments would be approved, HR 4419 remained in the Judiciary Committee until Congress adjourned.

### **2001**

Rep. Jim Leach introduced HR 556 (known as either "The Unlawful Internet Gambling Funding Prohibition Act" or the "Leach-LaFalce Act") to the 107th House of Representatives on February 12, 2001. HR 556 is essentially a continuation of HR 4419. That bill outlawed usage of a credit card, electronic fund transfer or any other bank instrument to pay for Internet gambling. It also provided a vehicle requiring U.S. Internet service providers (ISPs) to block access to or pull advertising from offshore Web gambling sites. It passed by a special suspension of the regular house rules by a "voice vote" consisting of 7 members of the house out of a total of 435 members.

No bill similar to HR 556 passed in the Senate in 2001.

Rep. John J. LaFalce introduced HR 2579 (also known as the Internet Gambling Payments Prohibition Act) to the 107th House of Representatives on July 20, 2001. HR 2579 was created as an alternative to HR 556. The difference was that this bill assumed that all Internet gambling was illegal as opposed to the language in HR 556, which only prohibited "unlawful" Internet Gambling, which was defined in the statute as gambling not permitted by the state. This bill was lost in a subcommittee late in 2001.

Rep. Michael G. Oxley introduced HR 3004 (also known as the Financial Anti-Terrorism Act of 2001) to the 107th House of Representatives on October 3, 2001. HR 3004 was created to combat the financing of terrorism in light of the September 11, 2001 attack. Many analysts believe it was hastily put together. The bill covered money laundering and "suspicious" financial transactions. Originally there were anti-gambling sections in the Anti-Terrorism Act, which were promptly eliminated. Removed were sections 303 and 304 which dealt with illegal financial transactions for internet gambling within the United States. HR 3004 went to the floor without the Internet Gambling portion and passed 412 to 1 on October 17, 2001.

Sen. Thomas Daschle, introduced the companion bill, S 1510 (also known as the Uniting and Strengthening America Act) on October 4,

2001. S 1510 contained NO Internet Gambling provisions at all and it passed without conflict on October 11, 2001 by a vote of 96 to 1.

### **2002**

In late 2002, John Conyers, Jr., introduced a bill that would create a five-member commission to study the feasibility of making Internet gambling legal in the United States. HR 5760, known as the Internet Gambling Licensing and Regulation Commission Act had no chance of passing in 2002 since the Senate had already adjourned when the bill was introduced. Conyers said he meant to start a dialogue for the next Congress.

### **2003**

Congressman Conyers from the US House of Representatives introduced HR 1223 (also known as the "Internet Gambling Licensing and Regulation Commission Act"). This is a re-introduction of his similar 2002 bill.

Rep. James A. Leach reintroduced a version of the Unlawful Internet Gambling Funding Prohibition Act (HR 566). The new bill number is HR 21. It is predominantly a reconciliation of HR 556 and HR 3215.

On May 19<sup>th</sup> 2003, Rep Bachus introduced HR 2143. H.R. 2143 (also known as the Unlawful Internet Gambling Funding Prohibition Act) passed in the House of Representatives by a vote of 319-104. The bill contains no criminal or civil liabilities and it is a shell of the 2002 version. It does not make online poker playing illegal; it merely makes it more difficult to get money into an offshore site.

A similar bill was introduced in the Senate. S 627 prohibits gambling businesses from accepting credit cards, checks, or other bank instruments from gamblers who illegally bet over the Internet. This legislation would prevent the use of credit cards, checks, and electronic fund transfers for Internet gambling. What the government doesn't realize is that all the Internet sites have already made alternate arrangements and no longer rely upon a credit card to put money in a gambling site. In October of 2003, the bill was put on the senate legislative calendar but no action was thereafter taken.

### **2004-2005**

Although there was much posturing, there is still nothing of significance coming out of Capitol Hill that would prohibit online poker.

### 3) Poker is a Game of Skill

In order to determine whether poker is a game of chance or a game of skill, one must begin with a working definition of "skill."

"Skill" has been defined as "an ability acquired by training and experience", "the ability to successfully perform a task or activity consistently over a period of time" or "ability, coming from one's knowledge, practice, and aptitude, to do something well."

It may be helpful to review what another jurisdiction has to say about skill v. luck. In *State v. Stroupe*, 238 N.C. 34, 76 S.E.2d 313 (1953), a case involving the legality of the game of pool, the Supreme Court stated: It would seem that the test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment. (*Id.* at 38, 76 S.E.2d at 316-317.)

#### Purposeful Decision-Making

Like any successful business, adept poker requires the ability to engage in **purposeful decision-making**. In order to be a winning poker player, there are many specific skills that must be learned and practiced over a period of time in order to make purposeful, informed decisions. They include, but are not limited to the following:

1. Mathematical skills (Odds and probabilities)
2. People-Reading Skills (Learning to detect "tells".)
3. Personal Discipline
4. Understanding Table Position
5. Keeping Records (the more data you have the better decisions you make.)
6. Understanding variances
7. Inducing action (staring, fiddling with chips, grabbing chips as if to bet) and
8. The art of bluffing.

In the United States Supreme Court decision of *Commissioner of IRS v. Groetzinger*, 480 U.S. 23; 107 S. Ct. 980; 94 L. Ed. 2d 25 (1987) the

high court held that most states permit some form of gambling and that if one gambled for a living, that ought to be considered a profession:

"Today ... the vast majority of States permit some form of public gambling ... If a taxpayer ... devotes his full-time activity to gambling, and it is his intended livelihood source, it would seem that basic concepts of fairness (if there be much of that in the income tax law) demand that his activity be regarded as a trade or business just as any other readily accepted activity, such as being a retail store proprietor or, to come closer categorically, as being a casino operator or as being an active trader on the exchanges." (Id. at 986.)

In other words, a professional gambler pays taxes on his income and writes off losses and business expenses, just like any other profession.

No one makes a living playing the lottery, bingo, slot machines, craps, baccarat, roulette or keno. The reason is that they all constitute games of chance. At a slot machine, one pushes a button and waits to see what happens, with no control as to the outcome.

If poker were played by putting all the money in the pot first and then dealing out all the cards, poker *would* be a game of chance. But that is precisely *not* what happens.

In a poker game, a player has control of the outcome of the game *in the long run* by making statistically correct decisions based upon probabilities, people reading skills, personal discipline, bluffing skills and table position. What this means is that when a poker player consistently makes the correct play, he will be a winning poker player.

Players do not have control over the specific cards that will be dealt much like the stock market does not have control of the weather or other factors which might harm a crop. A pharmaceutical company has no control over whether a new medicine will be successful. There is a risk and reward analysis based upon many factors before a decision is made. A business man doesn't have all the facts before he makes an investment, but based upon predictable variables, informed decisions are made. Those who have the best grasp of the facts, who also possess good decision-making skills, will be the most successful.

Poker is no different. A no-limit Texas Hold'em player is dealt two cards. Thereafter, he engages in a complicated decision making process before he makes a decision to call, raise or fold. How good is his hand, statistically speaking? How high does his hand "rank"? Let's say the player has KK, one of the best starting hands in Texas Hold'em. What

has he observed his opponents to have done in this session? What kind of player is each player at the table? Where is he sitting relative to when it will be his turn to make a decision? What do the other players do before it is his turn to act? After analysis on many levels, the first decision is made: call, check, raise or fold. (This is similar to business. Do I come out with a new product not having all the facts as to whether or not it will be successful?) He must read his opponent and figure out the cards in his opponent's hand based upon the way the opponent bets, the amount he bets, his body language, his past betting habits, and the sound in his voice. Let's say, he opines his opponent holds Ace-Queen. If he is holding two kings, he is about a 70-30 favorite, so he should raise his opponent.

Thereafter, three community cards are dealt face up. A new decision must be made based upon the statistical probability of winning the hand relative to other hands, a "read" on his opponent and a myriad of other factors. After that decision is made, there is another card, called the "turn" card (or fourth street), where a decision is made. The final card, called "the river" (or fifth street) offers one final time to make the ultimate decision. Thus, in Texas Hold'em, there are four decision making opportunities before the hand is completed.

There are countless books teaching players the fine art of poker playing. One of the most famous books is Doyle Brunson's *Super System*. As the cover story author for *Card Player Magazine*, I have personally interviewed such poker greats as Doyle Brunson himself, Daniel Negreanu, Mike Sexton, Gus Hansen, Annie Duke, Hasan Habib, Carlos Mortenson, Antonio Esfandaria, Layne Flack, Barry Greenstein, Dan Harrington, John Juanda and others. They have all read Doyle's book and consider it the "poker bible." They have similar answers regarding their consistent success. Poker is a job. They study and work diligently at their job. They are winning millions playing tournament poker and they continually fine tune their skills. Let's take a look at just some of the skills.

**Mathematical skills:** Mathematical skills include odds and probabilities. If I have a 66 and you have an Ace-Queen or even Ace-King, my small pair is a slight mathematical favorite. However, if you have five times as many chips as I do in a tournament, I might not call your bet because I don't want to lose the tournament on something that is essentially a coin flip. On the other hand, there is the concept of "Pot Odds", which basically addresses the amount of money in the pot relative to the amount of money I will have to risk in order to win. If I have to call a small amount with the possibility of winning a big pot, it is usually correct to call.

**People-Reading Skills:** People reading skills includes learning to detect "tells". If one player has the habit of putting a chip on his cards before it is his turn to act and then he raises, this tiny piece of information could be crucial. If a player is silent when he is bluffing, this is important to note. If the "rock" who never bets, makes a big bet, then I might fold, notwithstanding the pot odds.

**Personal Discipline:** The issue of personal discipline is an important factor for a successful poker player. Don't play when tired, troubled, on a losing streak or frustrated. Don't play after drinking, after a fight with a loved one, or with any other emotional stress. Have the discipline to walk away from a table when the cards are not "breaking even", that is, when probabilities don't turn into realities. Winning poker players all realize that it is not the money won in one poker session, but over time that measures the success of a good poker player. One must not play in a poker game that is too expensive when one cannot afford it. That is called playing over your bankroll. One must play at a level where one feels comfortable and can take the natural financial swings of poker.

**Understanding Table Position:** Table position means where you sit in relation to the dealer button. In Hold'em, the dealer button moves every hand. The first and second people after the dealer button, have to put in blinds, or forced bets. The next person is first to act. Those first three players are in "early position", the second three are in "middle position" and the last three are in "late position." Immediately it becomes obvious that the people in late position have an advantage because before they act, they will have seen what every other person has done before they make their decision. Players in late position can play more hands and raise more when they see that most of the other players have folded their hands. This is a very important aspect of a tournament, because every player gets good and bad cards. Sometimes a good player will not be concerned with the statistical analysis of his own cards, but he will do what is known as "play the player". He senses weakness in the player so he bets with whatever hand he has. Understanding these dynamics and becoming skilled in this area is an art in itself.

**Keeping Records:** A player must keep business records. Just like any other business model, the more data one has, the better decisions one makes. Successful poker players keep records in order to analyze which game, what stakes, what time of day and in what venues he finds the most success.

**Understanding Variances:** Crucial to the successful player is the understanding of variances. Even if there is only one card with which that player can lose a hand, it is a normal part of poker that the one dreaded card will come. Realizing these variances and understanding the concept of the cards "breaking even" assists even the best poker players.

**The art of bluffing:** This is a skill that gets better with age, like a fine wine. There is an appropriate time, place, player and amount to bluff. Every player will get good and bad cards, so it isn't getting lucky by having lots of good cards that allows a player to win consistently; it is how you play all the other hands as well and how you maximize the amount you will win in a particular hand.

**Inducing action:** Inducing action is similar to bluffing except that instead of being the actor, you are inducing action by your behavior. Staring, fiddling with chips, grabbing chips as if to bet are a few of the ways one induces action by another player.

In sum, many jurisdictions recognize poker as a game of skill, the IRS recognizes that people have the necessary skill to make a living playing poker and the players with the most skill consistently win over and over again.

*Allyn Jaffrey Shulman is one of the world's leading experts on online gambling law. Having been a courtroom attorney, practicing criminal defense for over 20 years, her expertise lies in the area of complex legal analysis, issues of constitutional magnitude, police and judicial misconduct and contempt of court. She is widely published and has lectured all over California teaching other attorneys the fine points of complex litigation. Shulman is the lawyer's lawyer.*

Att # 8

**Chairman Traynor & members of the Senate Judiciary  
Committee**

**My name is Warren DeKrey, Chrm. of the ND Council on  
Gambling Problems**

**I appear in opposition to HB 1509**

**This bill if enacted would require ND to license and regulate  
internet live poker.**

**The question is, why would internet live poker really want to  
be regulated?**

**For example this session has seen charitable gambling asking  
for less and less regulation. Requests have been for raised bets,  
extended hours, 24-7, and more games. Previous sessions have  
been similar, and in addition, often requesting a higher  
percentage of earnings for operating expenses, which now are  
over 50%.**

**Lets take another example, Racing Services Inc. – RSI. ND  
had the responsibility of regulating this entity. How did we  
do? After a court case involving Susan Bala, who was  
convicted, and the alleged participation by the Gambino crime  
family of NY, ND had unpaid taxes of more than 6 million  
dollars. Both Bala and the Gambino's have been indicted by a  
Grand Jury in NY and are awaiting trial, according to recent  
newspaper accounts. This is a good example of major crime  
getting involved in gambling.**

**Requiring the state to regulate large mega world wide  
establishments is a monumental task and enforcement could  
well be beyond the scope and capabilities of the AG dept. I**

have just mentioned the RSI in Fargo, do we want to put our state at even more risk?

It really appears that internet poker establishments are looking for a place that will insure them their money and also police their operation at no cost to them. They get their money and we get the exposure and grief.

The moral of the story is, crime likes to follow gambling, but often finds ways to avoid taxes. Crime and gambling have long been associated together. This bill has the potential of getting ND into a lot of trouble we don't need.

HB 1509 lists 7 different games and added are the words "any combination of these games, or any other similar poker games" This would allow any and all conceivable poker games and who knows what else.

Lets take the example of the lottery. The voters were told that they were only voting on an amendment to the constitution allowing the "Power Ball". What do we have today, Power Ball, Hot Lotto and Wild Card 2. In addition the state has indicated plans to add 2 more games and maybe a 3<sup>rd</sup>. There seems to be a way for gambling to proliferate from what seemed to have been intended.

High speed electronic gambling machines such as "Internet Gambling" are the "crack cocaine" of gambling, very highly addictive. Youth are twice as likely to become addicted as adults. What are we teaching our youth, don't work, just gamble, hoping to get rich? America should not be exporting such an addictive and dangerous product to a world that is looking to us for better leadership.

**ND needs to build its financial structure on a solid economic base. A good example is the Bank of ND and another good example is the State Mill & Elevator. These ventures have been a source of pride to North Dakotans. Can we have that same sense of pride in this proposed gambling venture?**

**The Bank of ND is touted as one of the reasons that internet live poker wants to come here. Do we want to taint the integrity of, and put at possible risk, our State Bank with the lure of internet poker? Certainly the moral integrity of our entire state needs to be considered when looking at this bill.**

**Would off-shore interests be concerned about the general good of our state and strive to improve it? Lets be honest about this. Internet live poker will only be interested in the money it will bring to them. Their only interest is in whatever will enable them to make more money. And should this bill become a reality and other states also become involved, they will quickly move to those states offering the best deal. At best, funds from internet live poker would be very volatile.**

**The gambling industry is not economic development. In fact gambling is reverse economic development, merely a redistribution of wealth in contrast to the 3-5% multiplier effect expected in the business community.**

**Legalized internet live poker is far different than the Lottery which was finally passed by the people, not the legislature. This bill is initiated by the legislature, not the people, this is quite a difference. You may recall that the House just defeated a bill which would have changed poker from its present 2 tournaments a year to allowing it all year long. Now we are being asked to approve internet poker 24-7.**

**I'm sure many of you read the front page article in last Sunday's Bismarck Tribune, which headline read "Feds say Internet Poker Bill Illegal". It cited the "Wire Act" and "Federal Money Laundering Statutes" as blocking internet poker. Though the sponsors response is that this can be resolved, the above and other information on the issue indicate that HB 1509 is definitely illegal. ND could spend a lot of money and time just to reaffirm that the bill is illegal. Why are we even considering an illegal bill?**

**Is this the lure of easy money?  
Is money everything?  
Is it greed?**

**There are 3 major problems with HB 1509**

- 1. Legality – Federal law makes this bill illegal**
- 2. Enforcement – Gambling has always been difficult to enforce, internet gambling will extremely difficult at best**
- 3. North Dakotans do not want this stigma on the state  
Too many people have been asking how to kill this bill**

**I urge a no vote on HB 1509**

Testimony of Dick Elefson, LAC LSW, Owner of DE Counseling Service, a licensed outpatient addiction treatment program, specializing in the treatment of compulsive gamblers and their family members since 1987, before the North Dakota Senate Judiciary Committee.

Mr. Chairman, and members of the committee, my name is Dick Elefson and I speak in opposition to House Bill 1509 for a number of reasons.

I have given testimony on a number of proposed gambling bills since 1977 and must say that House Bill 1509 is the most egregious, asinine bill that I have seen presented to the North Dakota Legislature.

Among other provisions, this bill purports that playing poker is not gambling. This is an excellent example of the authors of this bill failure to exercise intelligence and sound judgement. Essentially this bill insinuates that people are so dumb they do not know the difference between poker playing and gambling.

There are many different breeds and colors of horses, but a horse is still a horse, regardless of the color or breed. The real gambling experts are members of Gamblers Anonymous who provide the following definition of gambling: "...as any betting or wagering, for self or others, whether for money or not, no matter how slight or insignificant, where the outcome is uncertain or depends upon chance or 'skill' constitutes gambling"

A new poker craze has infiltrated the homes of Americans through television and the internet. Broadcasts of the World Poker Tournament has drawn unprecedented audiences which averaged one million households an episode. New shows such as Celebrity Poker have significantly increased the games exposure.

Poker is particularly appealing to teenage and college age students. In December I spoke to two Social Work classes at the U of Mary. In both classes every single student had not only heard about Texas Hold em, but all but two students had played the game in the past month, and all but four students had gambled on the internet within the last thirty days. They gambled, knowing that they are underage, and that such behavior is illegal in North Dakota. I need to point out, the operators of these games do not care about the legality of underage gambling.

Risk taking is central to the collegiate subculture in a more subtle but often hazardous preoccupation with gambling. Gambling has become so accepted in American society that few high school or college students consider it a social malady or a potential addiction.

One national study conducted by the Illinois Higher Education Center indicated that 90% of male college students and 82 % of female college students gambled at least once in the past year. Several studies have shown the 25% of college students gamble at least once a week.

Gambling has the potential to become an addictive activity and, when taken to excessive levels, can lead to many negative consequences. Based on my on-campus visits a sizeable percentage of college students already show signs of problem gambling.

Elefson testimony page 2

High school students are also at risk to become addictive gamblers. Poker parties all across the state are often conducted along with drinking parties and in some cases replacing drinking parties.

Typically many teens and college age students believe they are good at it. Unfortunately gambling behavior among high school and college students has been exploding beneath the awareness of parents, high school and college administrators. Gambling among students is probably the most prevalent of student behaviors receiving the least amount of attention.

The last twenty years has seen a dramatic public policy shift toward gambling. The unprecedented rise of gambling has created unparalleled access to gambling venues for today's youth, and coupled with a decreasing age at which most youth first experience gambling.

The increased visibility and availability of the internet lends itself to anonymity, ready access to credit cards, highly aggressive marketing strategies of casino's and other gambling entities and the opportunity to make fast money when faced with many expenses has contributed to the number of youthful problem gamblers.

A 2000 study conducted by the Lawrence Daily Kansas news department reported over 2000 gambling websites that take in over four billion dollars annually.

There are several reasons why on line gambling is so popular among youth ages sixteen to twenty five. No tangible cash money is involved, lending an air of detachment to actual losses or making it difficult for them to keep track of their losses.

Like drug addiction and alcoholism, compulsive gambling is an equal opportunity disease. It welcomes all comers regardless of sex, age, race, ethnicity, education, wealth or status.

Just yesterday I attended the Women's Health - Women's Lives Conference for North Dakota Women at the Bismarck Civic Center. This conference was attended by young women, middle aged women and older women. I conducted an informal survey and interviewed 134 women. I informed them that the North Dakota Senate would be voting on a Bill that would legalize internet gambling in North Dakota., which has been approved by the House of Representatives. Four, or three percent (3%) approved the legislation; eight or seven percent (7%) were undecided, and One hundred twenty nine, or ninety percent (90%) were against legalizing internet gambling.

Last, but not least, is that Federal Law prohibits internet gambling. I have heard that the proponents of this bill have gone on record to fight this issue in the courts to overturn the U. S. Department of Justice's determination that this proposed legislation is illegal. Why should the tax payers of North Dakota be called upon to spend thousands of dollars in legal fees to overturn federal law?.

Elefson testimony page three

Last week the Bismarck Tribune, and again yesterday morning featured stories on internet gambling and that the supporters of HB 1509 were bringing in the "Big Guns" of the internet off shore gambling industry to testify in favor of this proposed legislation. I ask you, why would those individual go to such expense to travel to Bismarck, North Dakota? Do you for one minute believe they are doing so out of care and concern for the welfare and well-being of our citizens, and that they want to improve our quality of life?

Or are they here to increase the billions of dollars of new revenues ! If you have to gamble to win - you lose. Mr chairman and members of the committee, I thank you for the opportunity to present my views, and I urge you to exercise intelligence and good judgement, and vote DO NOT PASS HB 1509. And when it is considered by the full Senate, that you vote no. Thank you.

Editorial Board

Julie Bechtel, Publisher
Dave Bundy, Editor
Ken Rogers, Managing Editor;
Kristin Wilson, Advertising Director

AA #10

By MARTY TOEPKE-FLOYD
Wishek

In my opinion, supporters of the scheme to legalize and regulate Internet poker gambling through the Bank of North Dakota are mistaken and misguided.

Legalizing, licensing and regulating Internet poker is unworkable.

Letters to the editor

Well-funded international and interstate gambling companies can easily set up front companies in North Dakota that look legitimate — like Racing Services, of Fargo, did — and then defraud the state and online players.

How can the Bank of North Dakota guarantee that online players in other states and countries will not rack up other gambling debts, then default on unsecured credit owed North Dakota?

Legalizing, licensing and regulating Internet poker is unreliable. The gambling industry is always coming up with new ways to extract more money from the public and to entice more people — especially young people — to gamble away their cash.

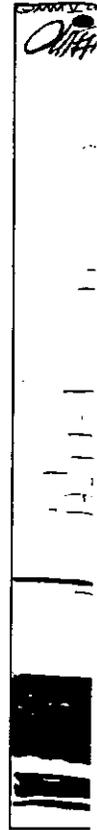
Each new form of gambling opened to the public negatively impacts the revenues of the existing ones (charitable gambling, reservation casinos, the lottery). Claims that millions of dollars in fees will come to the state if it sanctions Internet poker are unsustainable.

Legalizing, licensing and regulating Internet poker is unethical. By sanctioning and profiting from Internet poker gambling, our state would be promoting gambling addiction. Video gambling in any form is a highly addictive activity.

Wouldn't the state be partly responsible for any bankruptcy, abuse or suicide by a gambling addict? Wouldn't his family have an ethical if not legal claim to damages against the state, if state-sanctioned Internet poker contributed to social problems?

Maybe the pro-poker folks think that "Lady Luck," the fictional mascot of the North Dakota lottery, has real-life power to wave a magic wand of licensing, to sprinkle a little pixie dust of rules on the books and to whisper into existence secured credit cards from the Bank of North Dakota.

I call on the state Senate to defeat HB1509 and HCR3035, to send them both to Never-Never Land and to put a stop to the folly of gambling expansion in our state.



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dictionary

Handwritten notes: 1. to risk by gambling; 2. to stake something on a contingency; 3. to risk in an uncertain outcome. Includes the word 'Poker' and 'gambling'.

Handwritten contact info: (701) 844-1624, Arthur Q. Frank

...ude ranches, among others, from lawsuits over injuries caused by horses. This has passed both houses and is on the desk of Gov. John Hoeven.

Three small square symbols.

"It's kind of like missing (sell-

Besky

internet Live Poker  
~~video poker~~

I am against any expansion of gambling, including ~~video poker~~, and my reasoning for this stand is as follows:

1. I have yet to see any long-term economic benefit – creating new wealth for our state and communities.
2. Gambling promotes the untruth that an individual can get something for nothing, and to do so at the expense of a neighbor. It raises false hopes in the face of real needs.
3. Gambling costs our society more than it generates. Family problems, broken lives, financial crises and other human tragedies are a by-product of the abuse of gambling.
4. The primary responsibility we have as human beings is to treat one another with respect, help the poor – feed the hungry – help one another keep and improve his/her property. Gambling flies in the face of this.

I think supporting this measure is a step backward for our state, which is noted for a good work ethic and tremendous care for our neighbor.

We already have enough various forms of gambling in our state. Let us not expand any more than were we are with this matter today.

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03/10/2005 08:20 L'AUBERGE DEL MAR → 12023051448  
03/09/05 WED 04:47 FAX

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Att #11



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

March 7, 2005

Mr. Wayne Stenehjem  
Attorney General  
State of North Dakota  
600 E. Boulevard Avenue, Dept. 125  
Bismarck, North Dakota 58505

Dear Mr. Stenehjem:

In your conversations with representatives of the Department of Justice's Criminal Division and Office of Intergovernmental and Public Liaison, you requested a letter regarding the application of federal law to Internet gambling.

As a general rule, the Department of Justice is limited by statute to providing legal advice within the federal government, and the Criminal Division does not issue advisory opinions with respect to the legality of specific gambling operations. This allows the Department to defer the resolution of legal questions until it is confronted with a concrete situation requiring action in a judicial forum.

We may, however, provide general guidance as to relevant statutory provisions that are applicable to Internet gambling. As set forth in prior Congressional testimony, the Department of Justice believes that federal law prohibits gambling over the Internet, including casino-style gambling. While several federal statutes are applicable to Internet gambling, the main statutes are Sections 1084, 1952, and 1955 of Title 18, United States Code.

Section 1084 of Title 18, United States Code, prohibits one in the business of betting or wagering from knowingly using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers.

Section 1952 of Title 18, United States Code, prohibits traveling in interstate or foreign commerce, or using the mails, or using a facility in interstate or foreign commerce with intent to distribute the proceeds of an unlawful activity or otherwise promoting, managing, establishing, carrying on, or facilitating the promotion, management, establishment, or carrying on of

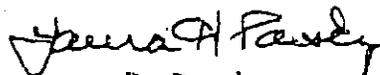
any unlawful activity and thereafter performing or attempting to perform such act. The term "unlawful activity" is defined in Section 1952(b) to mean "any business enterprise involving gambling . . . in violation of the laws of the state in which they are committed or of the United States."

Section 1955 of Title 18, United States Code, prohibits illegal gambling businesses, which involve 1) a violation of state law, 2) five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business, and 3) a business that has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2000 in any single day. In addition to criminal convictions, Section 1955 can be used to seek civil forfeiture of gambling proceeds. See *United States v. \$724,578.82 in United States Currency*, 286 F.3d 641 (3d Cir. 2002). With respect to all of the above statutes, it is the Department's view that the gambling activity occurs both in the jurisdiction where the bettor is located and the state or foreign country where the gambling business is located.

In addition to the actual gambling business being subject to prosecution under federal law, those persons or entities which knowingly assist the gambling business to operate would likewise be subject to prosecution. Section 2 of Title 18, United States Code, imposes criminal liability on those individuals or entities that aid, abet, counsel, command, induce, or procure the commission of an offense against the United States. Moreover, the federal money laundering statutes are applicable to unlawful Internet gambling businesses.

I trust that this is responsive to your inquiry. Please do not hesitate to contact us if we can be of any further assistance in this or any other matter.

Sincerely,



Laura H. Parsky  
Deputy Assistant Attorney General

Att #1

March 9, 2005

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

Page 1, line 2, after the second semicolon, insert "to create an attorney general internet live poker implementation and operating fund; to provide a continuing appropriation;"

Page 1, line 8, replace "in" with "by"

Page 1, line 8, after "poker", insert "player"

Page 1, line 9, remove "hand"

Page 1, after line 24, insert "The rules must include provisions concerning the financial responsibility of persons licensed under this chapter, the conduct of internet live poker, record-keeping, establishment and maintenance of internal controls, security of the internet poker site, and the deposit and payment of moneys received and disbursed by the licensee."

Page 2, line 1, after "sites" insert "- License – User fee"

Page 2, line 4, after "a", insert "nonrefundable license application fee of fifty thousand dollars and, upon meeting requirements for licensure, an annual"

Page 2, line 4, after "fee", insert "of twenty-five thousand dollars"

Page 2, line 5, after "site", insert ". The license may be annually renewed upon compliance with this chapter and rules adopted by the attorney general and payment of a twenty-five thousand dollar license renewal fee."

Page 2, line 5, replace "and an" with "The licensee must pay to the attorney general"

Page 2, line 5, after "annual", replace "licensing" with "user"

Page 2, line 6, replace "licensing" with "user"

Page 2, line 17, after "tax", insert "and player user fees"

Page 4, line 16, remove "All records and information with respect to"

Page 4, remove lines 17 through 20

Page 4, after line 20, insert:

"1. The following information and records are confidential:

- a. Sales and income tax information, financial statements, and credit reports of applicants and licensees, criminal and background check information of the applicant, licensee, and other persons obtained by the attorney general in the application or licensing process, and application information other than an applicant's name and address;
  - b. Information related to persons owing a debt to the state or having a debt collected through a state agency made confidential by another state law or rule remains confidential under this section;
  - c. Internal control and security procedures and information on bids or contractual data, the disclosure of which is harmful to the efforts of the attorney general to contract for goods and services on favorable terms; and
  - d. Personal information and the identity of a live internet poker player.
2. The information and records may be disclosed within the attorney general's office or to authorized persons in the proper administration of this chapter or rules adopted by the attorney general or in accordance with a judicial order.

**Qualifications of a licensee.** To be licensed under this chapter, in addition to other qualifications required by this chapter and rules adopted by the attorney general, a person must:

1. Be at least eighteen years of age if an individual;
2. Be of good character and reputation;
3. Have sufficient financial resources to support the activities required to conduct live internet poker under this chapter;
4. Be current in payment of all taxes, interest, and penalties owed to the state, excluding items under formal dispute or appeal pursuant to applicable statutes; and
5. Be authorized to conduct business in this state if an organization.

**Persons not qualified to be a licensee.** A person may not be licensed by the attorney general to conduct live internet poker under this chapter if the person:

1. Is an individual, an organization or any of the organization's officers or directors, or the employees or agents of an individual or an organization involved in the conduct of internet live poker in this state who has pled or been found guilty or pled nolo contendere in this state or any other jurisdiction to a criminal offense classified as a felony or an offense authorizing the imposition of more than one year imprisonment, unless at least ten years have passed since satisfactory completion of the sentence or probation imposed by the court for each offense;
2. Has been found to have violated any provision of this chapter or any rule adopted by the attorney general;
3. Has been found to have a background, including a criminal record, or prior activities that pose a threat to the public interests of the state or to the security and integrity of the conduct of internet live poker; create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of

internet live poker; or present questionable business practices and financial arrangements incidental to the conduct activities authorized by this chapter; or

4. Has knowingly made a false statement of material fact to the attorney general.

**Authority of attorney general.** The attorney general may:

1. Inspect all sites or premises in which live internet poker is conducted.
2. Inspect all live internet poker equipment and or other items on a site or premises used to conduct, or to assist in the conducting, of live internet poker.
3. Seize and remove from a site or premises and impound any equipment, supplies, or books and records for the purpose of examination and inspection.
4. Demand access to and inspect, examine, photocopy, and audit all books and records, stored data, software, and other data compilation in any form of applicants or licensees concerning compliance with this chapter or rules adopted by the attorney general. The attorney general may require a licensee to reimburse the attorney general for the reasonable actual cost of expenses incurred in conducting the inspection or audit.
5. Based on reasonable ground or written complaint, suspend, deny, or revoke an application or license for violation, by the applicant or licensee or any officer, director, agent, member, or employee of the applicant or licensee, of this chapter or any rule adopted by the attorney general.
6. Impose a monetary fine on a licensee for failure to comply with this chapter or any rule adopted by the attorney general.
7. At any time within three years after any amount of fees, monetary fine, or tax required to be paid pursuant to this chapter becomes due, bring a civil action to collect the amount due. An action may be brought although the person owing the fees, fine, or tax is not presently licensed.
8. Institute an action in any district court for declaratory or injunctive relief against a person, whether or not the person is a live internet poker licensee, as the attorney general deems necessary to prevent noncompliance with this chapter or rules adopted by the attorney general.
9. Require the applicant or licensee to provide information and records in such form and in the manner determined by the attorney general to determine qualification for issuance of a license or to determine compliance with this chapter and rules adopted by the attorney general.

**Location of licensee site, premises, records, and equipment.** The live internet poker licensee shall establish and maintain a physical site premises only within this state and shall not conduct live internet poker at sites or premises outside this state. The licensee shall maintain within this state, in accordance with this chapter and rules adopted by the attorney general, all servers, records, books, stored data, software, hardware, compiled data, and such other equipment or items used to conduct live internet poker.

**Persons prohibited from playing live internet poker.**

1. No person under the age of eighteen years may play internet live poker at a site licensed under this chapter. A live internet poker licensee shall not permit a person under the age of eighteen years to play internet live poker and shall adopt internal controls and procedures approved by the attorney general to block access to the site or to prohibit play by those persons.

2. No licensee or its officers, directors, partners, employees, or its authorized agents may play internet live poker at a site licensed under this chapter.

**SECTION 2. Attorney general live internet poker implementation and operating fund – Continuing appropriation.** The attorney general may establish an attorney general live internet poker implementation and operating fund of one million dollars consisting of gifts, grants, or other funds obtained from nongovernmental sources. The funds are appropriated as a standing and continuing appropriation to the attorney general for the purpose of paying the costs and expenses associated with the implementation, administration, and enforcement of this Act incurred until June 30, 2007. No expenditures may be made from the fund until the effective date of this Act and until the sum of one million dollars has been deposited in the fund.

Page 4, line 21, replace "2" with "3"

Renumber accordingly

Att #1

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

Page 1, line 2, after the second semicolon, insert "to provide an appropriation;"

Page 1, line 8, replace "in" with "by"

Page 1, line 8, after "poker", insert "player"

Page 1, line 9, remove "hand"

Page 1, after line 24, insert" The rules must include provisions concerning the financial responsibility of persons licensed under this chapter, the conduct of internet live poker, record-keeping, establishment and maintenance of internal controls, security of the internet poker site, and the deposit and payment of moneys received and disbursed by the licensee."

Page 2, line 1, after "sites" insert "- License - User fee"

Page 2, line 4, after "include", insert "a nonrefundable license application fee of twenty-five thousand dollars and, upon meeting requirements for licensure,"

Page 2, line 4, after "fee", insert "of <sup>Non-Refundable Applic Fee</sup> ~~twenty-five~~ <sup>50,000</sup> thousand dollars" + \$25,000 Annual

Page 2, line 5, after "site", insert a period

Page 2, line 5, replace "and an" with "The licensee must pay to the attorney general"

Page 2, line 5, after "annual", replace "licensing" with "user"

Page 2, line 6, replace "licensing" with "user"

Page 2, line 17, after "tax", insert "and player user fees"

Page 4, line 16, remove "All records and information with respect to"

Page 4, remove lines 17 through 20

Page 4, after line 20, insert:

- "1. The following information and records are confidential:
  - a. Sales and income tax information, financial statements, and credit reports of applicants and licensees, criminal and background check information of the applicant, licensee, and other persons obtained by the attorney general in the application or licensing process, and application information other than an applicant's name and address;
  - b. Information related to persons owing a debt to the state or having a debt

collected through a state agency made confidential by another state law or rule remains confidential under this section;

c. Internal control and security procedures and information on bids or contractual data, the disclosure of which is harmful to the efforts of the attorney general to contract for goods and services on favorable terms; and  
d. Personal information and the identity of a live internet poker player.

2. The information and records may be disclosed within the attorney general's office or to authorized persons in the proper administration of this chapter or rules adopted by the attorney general or in accordance with a judicial order.

**Qualifications of a licensee.** To be licensed under this chapter, in addition to other qualifications required by this chapter and rules adopted by the attorney general, a person must:

1. If an individual, be at least eighteen years of age;
2. Be of good character and reputation;
3. Have sufficient financial resources to support the activities required to conduct live internet poker under this chapter;
4. Be current in payment of all taxes, interest, and penalties owed to the state, excluding items under formal dispute or appeal pursuant to applicable statutes;
5. If an organization, be authorized to conduct business in this state.

**Persons not qualified to be a licensee.** A person may not be licensed by the attorney general to conduct live internet poker under this chapter if the person:

1. Is an individual, an organization or any of the organizations' officers, directors, or the employees or agents of an individual or an organization involved in the conduct of internet live poker in this state who has pled or been found guilty or pled nolo contendere in this state or any other jurisdiction to a criminal offense classified as a felony or an offense authorizing the imposition of more than one year imprisonment, unless at least ten years have passed since satisfactory completion of the sentence or probation imposed by the court for each offense;
2. Has been found to have violated any provision of this chapter or any rule adopted by the attorney general;
3. Has been found to have a background, including a criminal record, or prior activities that pose a threat to the public interests of the state or to the security and integrity of the conduct of internet live poker; create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of internet live poker; or present questionable business practices and financial arrangements incidental to the conduct activities authorized by this chapter; or
4. Has knowingly made a false statement of material fact to the attorney general.

**Authority of attorney general.** The attorney general may:

1. Inspect all sites or premises in which live internet poker is conducted.



Renumber accordingly

Att #1  
\*UnderScore

3/14

March 14, 2005

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1509

Page 1, line 2, after the second semicolon, insert "to create an attorney general internet live poker implementation and operating fund; to provide a continuing appropriation;"

Page 1, line 8, replace "in" with "by"

Page 1, line 8, after "poker", insert "player"

Page 1, line 9, remove "hand"

Page 1, after line 24, insert "The rules must include provisions concerning the financial responsibility of persons licensed under this chapter, the conduct of internet live poker, record-keeping, establishment and maintenance of internal controls, security of the internet poker site, and the deposit and payment of moneys received and disbursed by the licensee."

Page 2, line 1, after "sites" insert "- License - User fee"

Page 2, line 4, after "a", insert "nonrefundable license application fee of fifty thousand dollars and, upon meeting requirements for licensure, an annual"

Page 2, line 4, after "fee", insert "of twenty-five thousand dollars"

Page 2, line 5, after "site", insert ". The license may be annually renewed upon compliance with this chapter and rules adopted by the attorney general and payment of a twenty-five thousand dollar license renewal fee."

Page 2, line 5, replace "and ~~in~~" with "The licensee must pay to the attorney general" (after) an

Page 2, line 5, after "annual", replace "licensing" with "user"

Page 2, line 6, replace "licensing" with "user"

Page 2, line 17, after "tax", insert "and player user fees"

Page 4, line 14, after "chapter", remove "or who plays without first obtaining a license from the"

Page 4, line 15, remove "attorney general in that individual's name"

Page 4, line 16, remove "All records and information with respect to"

Page 4, remove lines 17 through 20

Page 4, after line 20, insert:

- "1. The following information and records are confidential:
  - a. Sales and income tax information, financial statements, and credit reports of applicants and licensees, criminal and background check information of the applicant, licensee, and other persons obtained by the attorney general in the application or licensing process, and application information other than an applicant's name and address;
  - b. Information related to persons owing a debt to the state or having a debt collected through a state agency made confidential by another state law or rule remains confidential under this section;
  - c. Internal control and security procedures and information on bids or contractual data, the disclosure of which is harmful to the efforts of the attorney general to contract for goods and services on favorable terms; and
  - d. Personal information and the identity of a live internet poker player.
2. The information and records may be disclosed within the attorney general's office or to authorized persons in the proper administration of this chapter or rules adopted by the attorney general or in accordance with a judicial order.

**Qualifications of a licensee.** To be licensed under this chapter, in addition to other qualifications required by this chapter and rules adopted by the attorney general, a person must:

1. Be at least eighteen years of age if an individual;
2. Be of good character and reputation;
3. Have sufficient financial resources to support the activities required to conduct live internet poker under this chapter;
4. Be current in payment of all taxes, interest, and penalties owed to the state, excluding items under formal dispute or appeal pursuant to applicable statutes; and
5. Be authorized to conduct business in this state if an organization.

**Persons not qualified to be a licensee.** A person may not be licensed by the attorney general to conduct live internet poker under this chapter if the person:

1. Is an individual, an organization or any of the organization's officers or directors, or the employees or agents of an individual or an organization involved in the conduct of internet live poker in this state who has pled or been found guilty or pled nolo contendere in this state or any other jurisdiction to a criminal offense classified as a felony or an offense authorizing the imposition of more than one year imprisonment, unless at least ten years have passed since satisfactory completion of the sentence or probation imposed by the court for each offense;

2. Has been found to have violated any provision of this chapter or any rule adopted by the attorney general;

3. Has been found to have a background, including a criminal record, or prior activities that pose a threat to the public interests of the state or to the security and integrity of the conduct of internet live poker; create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of internet live poker; or present questionable business practices and financial arrangements incidental to the conduct activities authorized by this chapter; or

4. Has knowingly made a false statement of material fact to the attorney general.

**Authority of attorney general.** The attorney general may:

1. Inspect all sites or premises in which live internet poker is conducted.

2. Inspect all live internet poker equipment and or other items on a site or premises used to conduct, or to assist in the conducting, of live internet poker.

3. Seize and remove from a site or premises and impound any equipment, supplies, or books and records for the purpose of examination and inspection.

4. Demand access to and inspect, examine, photocopy, and audit all books and records, stored data, software, and other data compilation in any form of applicants or licensees concerning compliance with this chapter or rules adopted by the attorney general. The attorney general may require a licensee to reimburse the attorney general for the reasonable actual cost of expenses incurred in conducting the inspection or audit.

5. Based on reasonable ground or written complaint, suspend, deny, or revoke an application or license for violation, by the applicant or licensee or any officer, director, agent, member, or employee of the applicant or licensee, of this chapter or any rule adopted by the attorney general.

6. Impose a monetary fine on a licensee for failure to comply with this chapter or any rule adopted by the attorney general.

7. At any time within three years after any amount of fees, monetary fine, or tax required to be paid pursuant to this chapter becomes due, bring a civil action to collect the amount due. An action may be brought although the person owing the fees, fine, or tax is not presently licensed.

8. Institute an action in any district court for declaratory or injunctive relief against a person, whether or not the person is a live internet poker licensee, as the attorney general deems necessary to prevent noncompliance with this chapter or rules adopted by the attorney general.

9. Require the applicant or licensee to provide information and records in such form and in the manner determined by the attorney general to determine qualification for issuance of a license or to determine compliance with this chapter and rules adopted by the attorney general.

**Location of licensee site, premises, records, and equipment.** The live internet poker licensee shall establish and maintain a physical site premises only within this state and shall not conduct live internet poker at sites or premises outside this state. The licensee shall maintain within this state, in accordance

with this chapter and rules adopted by the attorney general, all servers, records, books, stored data, software, hardware, compiled data, and such other equipment or items used to conduct live internet poker.

**Persons prohibited from playing live internet poker.**

1. No person under the age of eighteen years may play internet live poker at a site licensed under this chapter. A live internet poker licensee shall not permit a person under the age of eighteen years to play internet live poker and shall adopt internal controls and procedures approved by the attorney general to block access to the site or to prohibit play by those persons.

2. No licensee or its officers, directors, partners, employees, or its authorized agents may play internet live poker at any site licensed under this chapter.

**SECTION 2. Attorney general live internet poker implementation and operating fund – Continuing appropriation.** The attorney general shall <sup>may</sup> establish an attorney general live internet poker implementation and operating fund of one million dollars consisting of gifts, grants, or other funds obtained from nongovernmental sources. The funds are appropriated as a standing and continuing appropriation to the attorney general for the purpose of paying the costs and expenses associated with the implementation, administration, and enforcement of this Act incurred until June 30, 2007. No expenditures may be made from the fund until the effective date of this Act and until the sum of one million dollars has been deposited in the fund.

Page 4, line 21, replace "2" with "3"

Re-number accordingly

Att #3

Catania & Associates, LLC

Law Offices

909 Belmont Avenue

North Haledon, New Jersey 07508

Tel. (973)423-4777 Fax (973)423-2003

Frank Catania, Jr.  
Catania

Frank  
of Counsel

Memorandum

To: Representative Jim Kasper

Date: March 14, 2005

RE: Department of Justice Letter Dated March 7, 2005, addressed to the North Dakota Attorney General Wayne Stenehjem

The United States Department of Justice, Criminal Division letter addresses to the North Dakota Attorney General Wayne Stenehjem dated March 7, 2005 is similar to those received by the State of Nevada and the United States Virgin Islands after each had passed legislation authorizing some form of Internet gaming. All of the letters refer the recipient to Section 1084, Title 18 of the U.S. Code commonly known as the "Wire Act." Section 1084 (a) states;

"Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both." (emphasis added)

The language is clear that the reference is to "...the placing of bets or wagers on any sporting event or contest..." North Dakota is not proposing legislation that would permit any wagers on sporting events or contests; the North Dakota legislation is specific to online poker.

The Wire Act was specifically found by federal courts in the Fifth Circuit Court of Appeals not to apply to Internet casino gambling. In *In Re MasterCard International Inc.*, (132 F. Supp. 2d 468 (E.D. La. 2001)), a district court had to determine in multidistrict litigation whether numerous plaintiffs who lost wagering at offshore casinos could recover losses from their credit card companies. Plaintiffs had hoped to obtain class status to pursue a Racketeer Influenced and Corrupt Organizations Act (RICO) claim against credit card companies such as MasterCard. In order to assert a RICO claim, plaintiffs would have to show, inter alia, "that Internet gambling violates the several federal and state statutes as alleged in the complaint" (*In Re MasterCard* at 478).

The district court concluded that the Wire Act (18 U.S.C. § 1084) was applicable only to sports wagering.

"However, even a summary glance at the recent legislative history of internet gambling legislation reinforces the Court's determination that internet gambling on a game of chance is not prohibited conduct under 18 U.S.C. § 1084. Recent legislative attempts have sought to amend the Wire Act to encompass 'contest[s] of chance or a future contingent event not under the control or influence of [the bettor]' while exempting from the reach of the statute data transmitted 'for use in the new reporting of any activity, event or contest upon which bets or wagers are based.' See S. 474, 105<sup>th</sup> Congress (1997). Similar legislation was introduced in the 106<sup>th</sup> Congress in the form of the 'Internet Gambling Prohibition Act of 1999.' See, S. 692, 106<sup>th</sup> Congress (1999). That act sought to amend Title 18 to prohibit the use of the internet to place a bet or wager upon 'a contest of others, a sporting event, or a game of chance...' Id. As to the legislative intent at the time the Wire Act was enacted, the House Judiciary Committee Chairman explained that 'this particular bill involves the transmission of wagers or bets and layoffs on horse racing and other sporting events.' See 107 Cong. Rec. 16533 (Aug. 21, 1961). Comparing the fact of the Wire Act and the history surrounding its enactment with the recently proposed legislation, it becomes more certain that the Wire Act's prohibition of gambling activities is restricted to the types of events enumerated in the statute, sporting events or contests. Plaintiffs' argument flies in the face of the clear wording of the Wire Act and is more appropriately directed to the legislative branch than this Court." (*In Re MasterCard* at 480-481)

The United States Court of Appeals affirmed the district court's analysis of the inapplicability of the Wire Act to anything other than sports wagering. "The district court concluded that the Wire Act concerns gambling on sporting events or contests and that the plaintiffs had failed to allege that they had engaged in internet sports gambling. We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion. The plaintiffs may not rely on the Wire Act as a predicate offense here. ... Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal." (*In Re MasterCard Int'l Internet Gambling Litig.*, 313 F.3d 257, 262, 263 (5<sup>th</sup> Cir. 2002)). While this decision is binding only on federal courts within the Fifth Circuit, the decision certainly would create reasonable doubt should an Internet casino be prosecuted under the Wire Act.

The success of prosecutors under another statute has been unclear with the result usually favoring the accused. 18 U.S.C. § 1955 (Anti-Gambling Act) allows federal prosecutors to bring criminal charges against entities that violate state anti-gambling legislation. In *U.S. v. Truesdale*, a jury found the defendants guilty for violating 18 U.S.C. § 1955 and other federal laws. The conviction was reversed on appeal because of a technicality. The court opined, in dicta:

"Perhaps in some circumstances, evidence of callers attempting to place bets, the mere capability to input illegal bookmaking information into the offshore computer, and the other circumstantial evidence might lead to a rational inference that appellants were engaged in illegal bookmaking in Texas. However, looking at the overall circumstances of this case, such an inference is unwarranted. Jones and his co-appellants went to great effort to make sure that their operation was legal. They set up offshore offices and consulted with lawyers in the United States and abroad on the legality of their enterprise; they furnished the Caribbean local offices with desks and telephones and staffed them with personnel to accept international phone wagers; they set up separate phone lines that could be used to place bets in the offshore

offices. Under these circumstances, without specific evidence of any wrongdoing, it is irrational to conclude beyond a reasonable doubt that after having gone through the effort of fully equipping, staffing and widely advertising the Caribbean offices, the appellants nevertheless illegally accepted bets in the United States.” (152 F. 3d 443 (5<sup>th</sup> Cir. 1998))

The Department of Justice has made it a practice of sending threatening letters in an attempt to enforce its opinion, which in this case is contrary to case law. The U.S. Attorney informed the National Association of Broadcasters that “those persons or entities which knowingly assist the gambling business to operate would likewise be subject to prosecution pursuant to 18 U.S.C. § 2 ‘Aiding and Abetting’” (letter, June 11, 2003, to National Association of Broadcasters). This letter, however, was directed only at the media that accepted ads for interactive gambling. The U.S. Attorney, in a scare tactic often used by federal and state prosecutors, has warned of possible illegal action pursuant to its letter to the National Association of Broadcasters. The letter states that:

“Notwithstanding their frequent claims of legitimacy, Internet gambling and offshore sportsbook operations that accept bets from customers in the United States violate Sections 1084, 1952, and 1955 of Title 18 of the United States Code, each of which is a Class E felony. Additionally, pursuant to Title 18, United States Code, Section 2, any person or entity who *aids or abets* in the commission of any of the above-listed offenses is punishable as a principal violator of those statutes. The Department of Justice is responsible for enforcing these statutes, and we reserve the right to prosecute violators of the law.

Broadcasters and other media outlets should know of the illegality of offshore sportsbook and Internet gambling operations since, presumably, they would not run advertisements for illegal narcotics sales, prostitution, child pornography or other prohibited activities. We’d appreciate it if you would forward this public service message to all of your member organizations which may be running such advertisements, so that they may consult with their counsel or take whatever actions they deem appropriate.” [emphasis added]

This aiding and abetting “catch all” provision is an attempt to fill in gaps in the existing federal legislation (Lawrence G. Walters, “Advertising and U.S. Law,” *Internet Gambling Report*, 7<sup>th</sup> ed. 2004 at 339). This U.S. policy of targeting advertisers was challenged in litigation by Casino City, an offshore entity that filed suit against the Department of Justice in a Louisiana federal court. Casino City was asking for a declaratory ruling that the Justice Department activity/policy is a prohibition against commercial speech that is protected under the First Amendment to the U.S. Constitution (Complaint 4-557-B-M-3). The United States Government moved to dismiss the complaint and on February 16, 2005, the federal judge granted the government’s motion to dismiss citing Casino City’s lack of standing before the Court. The Court stated “Casino City has failed to establish an actual case or controversy....” This decision is actually a win for Casino City since the Court did not find that Casino City was in danger of being charged since the Court felt that no laws had been violated. Currently Casino City is considering an appeal to the Fifth Circuit Court of Appeals however they feel the lower court’s ruling was not unfavorable. The Department of justice does not want this matter adjudicated since an adverse ruling to their opinion in this or any other matter would void their use of scare tactics such as being used against the people of the State of North Dakota.

It is important to note that the Department of Justice has issued an opinion that the amendment to the Interstate Horseracing Act has not legalized interactive interstate horse racing, yet, the State of California has issued licenses and the interactive horse racing industry is successfully operating without interference from the Department of Justice.

This legislation still has to be approved by the people of the State of North Dakota in the spring of 2006. Why is the Department of Justice sending threatening letters now? The Department of Justice does not want this matter heard by a court of competent jurisdiction because their chance of prevailing is minimal because of the rulings issued by the courts in the Fifth Circuit. The Department of Justice would much rather issue letters threatening action and not have to support their opinion in court.

In my opinion the Legislature of the State of North Dakota should proceed with the passage of the HB 1509 and CR 3035 and if the Department of Justice challenges the law North Dakota should not back down but proceed to a final outcome. The Department of Justice does not want this issue resolved to final judgment since they know their chances of prevailing are not good. It has been stated publicly that the industry would be willing to subsidize the costs of the litigation for the people of North Dakota.

Att #4 3/19

STATE OF NORTH DAKOTA  
OFFICE OF ATTORNEY GENERAL

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Wayne Stenehjem  
ATTORNEY GENERAL

MEMORANDUM

TO: The Honorable Jim Kasper, House of Representatives  
FROM: Robert P. Bennett, Assistant Attorney General  
RE: 18 U.S.C. § 1084 (Wire Wager Act) and House Bill No. 1509  
DATE: February 14, 2005

You have asked whether House Bill No. 1509 may be in violation of 18 U.S.C. § 1084, also known as the Wire Wager Act. This office has previously provided information to you regarding concerns with House Bill No. 1509 relative to the restrictions in the North Dakota Constitution, which I understand you are seeking to address. Therefore, I will not reiterate those concerns here, but will only address the bill as far as the Wire Wager Act is concerned. Attorney General Stenehjem has asked that I respond to your inquiry with the understanding it will be the determination of federal authorities, and not state officials, as to whether specific conduct would fall within the criminal prohibitions of this federal law. I can, however, provide you with a summary of federal court cases construing the scope of 18 U.S.C. § 1084.

The Wire Wager Act, 18 U.S.C. § 1084, provides:

**18 U.S.C § 1084. Transmission of wagering information; penalties**

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or

The Honorable Jim Kasper  
February 14, 2005  
Page 2

foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored.

(e) As used in this section, the term "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a commonwealth, territory or possession of the United States.

Although states generally have the authority to regulate gaming within their own boundaries, gaming conducted in interstate or foreign commerce may be subject to federal regulatory authority. A violation of the prohibitions of 18 U.S.C. § 1084 is a crime subjecting the convicted offender to a fine and a term of imprisonment.

It has been held by federal courts that the Wire Wager Act does not apply to a social bettor but, rather, applies to the business of gambling; i.e. bookmaking and similar activities. In addition, lower court case law also indicates that the object of the activity prohibited by the Wire Wager Act relates to a "sporting event or contest" and may not be extended to other forms of gambling activity. Since the activity contemplated by House Bill No. 1509 as presently worded does not fall within the parameters of 18 U.S.C. § 1084, it would not appear that the Wire Wager Act would apply to that activity.

However, as I have indicated to you previously, the ultimate decision as to whether activities of a person engaged in interstate or foreign commerce violates 18 U.S.C. § 1084 will be made by the appropriate federal law enforcement and prosecuting authorities. Based upon the specific conduct involved, it is possible that other federal statutes may be

The Honorable Jim Kasper  
February 14, 2005  
Page 3

considered or a court may provide a ruling that may expand the scope of 18 U.S.C. § 1084. Since federal authorities may examine the validity of the conduct from the place where the wager was made and where it was received, prosecutorial decisions may be made by other than a North Dakota state or federal prosecutor.

vkk

# Greenberg Traurig

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AH #5

March 14, 2005

## VIA E-MAIL

James Kasper  
State Representative  
1128 Westrac Drive  
Fargo, ND 58103-2342

Re: Department of Justice Comments on Bill to Legalize Live Internet Poker (HB 1509)

Dear Representative Kasper:

I am writing in response to your request for an analysis of the March 7, 2005 letter from United States Deputy Assistant Attorney General Laura Parsky to North Dakota Attorney General Wayne Stenehjem regarding North Dakota's effort to legalize and regulate live Internet poker.

The letter states that "the Department of Justice *believes* that federal law prohibits gambling over the Internet, including casino-style gambling," and then proceeds to discuss three federal gambling statutes, the federal aiding and abetting statute and the federal money laundering laws. I will address these statutes in the order in which they were discussed by the Department of Justice ("DOJ").

In order to fully appreciate the situation, it is essential to understand the legal framework governing gambling activities in the United States. In the United States, the prohibition and/or regulation of gambling is a matter of state law. Nevada permits a wide range of gambling activities throughout the state. Other states, such as Mississippi and New Jersey permit a wide range of gambling activities, but only at certain geographic locations, such as riverboats and Atlantic City casinos. Finally, other states, and in fact most states, permit limited gambling activities such as thoroughbred racing, jai lai, bingo, etc. And, of course, almost all states permit, and themselves operate, lotteries. Superimposed on these state laws are the federal statutes, which were enacted to assist the states in enforcing the state laws. So, it is the states and not the federal government which determine what forms of gaming are legal and what forms are illegal.

ALBANY  
AMSTERDAM  
ATLANTA  
BOCA RATON  
BOSTON  
CHICAGO  
DALLAS  
DELAWARE  
DENVER  
FORT LAUDERDALE  
LOS ANGELES  
MIAMI  
NEW JERSEY  
NEW YORK  
ORANGE COUNTY, CA  
ORLANDO  
SILICON VALLEY  
PHILADELPHIA  
PHOENIX  
TALLAHASSEE  
TYSONS CORNER  
WASHINGTON, D.C.  
WEST PALM BEACH  
ZURICH

The Wire Act (18 U.S.C. 1084)

The Department of Justice states that Section 1084 of Title 18, United States Code, prohibits one

...in the business of betting or wagering from knowingly using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers. 18 U.S.C. § 1084(a).

The DOJ is actually quoting the Wire Act verbatim in its letter, and is correct as far as it goes. However, it does not go far enough. It stopped its quote of the Wire Act in mid-sentence, omitting six very significant words. The statute actually prohibits one:

...in the business of betting or wagering from knowingly using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest. 18 U.S.C. 1804(a). [Emphasis added.]

Those last six words are critical to the issue at hand. "On any sporting event or contest" means exactly what it says. The statute only applies to bets or wagers on sporting events or contests, not on non-sports casino gambling. The Supreme Court has established the rules of statutory construction, and if the statutory language is clear and unambiguous, then you look no further and follow the language of the statute. The Wire Act makes it a crime to send or receive wagers *on sporting events or contests*. Sporting events are football, baseball, basketball, hockey, golf, tennis or whatever, but not poker.

If there were some doubt as to the meaning of the statute, and I don't think there is, the courts turn to case law and the legislative intent of Congress. There have been numerous cases addressing the question of whether the Wire Act applies to non-sports gambling and the case law is consistent – it does not. The most recent case dealing with the issue was In re: MasterCard International, 2001 WL 197834 (E.D.LA.), a civil RICO case, which hinged on the applicability of the Wire Act to non-sports Internet gambling. In deciding the issue, the court stated that the wording of the Act, the case law and the legislative intent all lead to the conclusion that the Wire Act only covers sports gambling. The case was upheld on appeal by the Fifth Circuit Court of Appeals, which stated:

We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion. In Re: MasterCard Int'l. 313 F.3d 257, 262 5<sup>th</sup> Cir. 2002).

Simply stated, the Wire Act does not cover non-sports gambling. That is the law, as enacted by Congress and interpreted by the courts, the desires and opinion of the Department of Justice notwithstanding.

The Travel Act (18 U.S.C. 1952)

The DOJ states that the Travel Act prohibits interstate travel or use the mails or any facility in interstate or foreign commerce to distribute the proceeds of an unlawful activity or otherwise facilitate the promotion, management establishment or carrying on of any unlawful activity. The definition of "unlawful activity" includes any business enterprise involving gambling offenses "in violation of the laws of the State in which they are committed or of the United States."

The Internet poker sites will be located and licensed in North Dakota and conducting their business activities in compliance with North Dakota laws and regulations, so they will be legal in North Dakota as long as they abide by the State's laws. However, it is the DOJ's view that the gambling activity occurs not only where the gambling business is located, but also in the jurisdiction where the bettor is located. Although DOJ offers nothing to support that argument, there are two lower court cases in New York, one state and one federal, where the courts ruled that the Travel Act applied to an offshore bookmaker taking bets over the telephone from bettors in New York. People v. World Interactive Gaming Corp., 1999 WL 591995 (N.Y.Sup.); (United States v. Kaczowski, 114 F.Supp.2d 143 (W.D.N.Y., 2000)). The courts reasoned that the offshore bookmakers were operating their businesses in New York by phone in violation of New York's bookmaking statute, and therefore in violation of the Travel Act.

There have been no attempts to apply this theory to non-sports gambling cases, but several states have enacted laws prohibiting Internet gambling, and depending on the precise wording of the statutes, it could be a crime to accept players from one or more of those states. I say could be a crime, because the statutes do not specifically reference Internet poker, there is no case law interpreting the scope and reach of the statutes, and there are significant issues relative to the applicability of the statutes to poker games being offered from jurisdictions where the game is legal. Nonetheless, North Dakota may want to consider prohibiting operators from accepting players from any states, which have enacted Internet gambling legislation deemed to prohibit the offering of Internet poker services to its residents.

The Illegal Gambling Businesses Statute (18 U.S.C. § 1955)

This statute prohibits the operation of a gambling business in violation of the laws of the state where the business is conducted.

Once again, it is the DOJ's view that the gambling activity occurs not only where the gambling business is located, but also in the jurisdiction where the bettor is located. Once again, DOJ offers nothing to support that argument. Moreover, there is no case law extending the reach of the statute to the location of the player. Nonetheless, if North Dakota prohibits operators from accepting players from states which have enacted Internet gambling legislation covering poker, it will avoid the issue.

Kasper, Jim M.  
March 14, 2005  
Page 4

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Aiding and Abetting (18 U.S.C. § 2)

DOJ also states that persons knowingly assisting the gambling businesses would be subject to prosecution under the aiding and abetting statute. This could be true, but only if the gambling businesses were violating the law. The gambling businesses operating in North Dakota would be legal, so there could be no aiding and abetting, because there would be nothing to aid and abet.

Money Laundering (18 U.S.C. §§ 1956/1957)

DOJ closes by asserting that the federal money laundering statutes are applicable to unlawful Internet gambling. That is true – the statutes are applicable to unlawful Internet gambling businesses. However, they are not applicable to licensed gambling businesses operating within the law.

\* \* \* \*

In conclusion, the DOJ letter is very misleading. It states the law as DOJ would like it to be, not as it is. There is nothing preventing North Dakota from moving forward with HB 1509, as long as the State is mindful of the laws of other states and countries, which may wish to prohibit their residents from playing Internet poker.

Sincerely yours,

/s/

Patrick T. O'Brien

March 14, 2005

## Ante Up at Dear Old Princeton: Online Poker Is a Campus Draw

By JONATHAN CHENG

**P**RINCETON, N.J. - For Michael Sandberg, it started a few years ago with nickel-and-dime games among friends. But last fall, he says, it became the source of a six-figure income and an alternative to law school.

Mr. Sandberg, 22, of Alexandria, Va., mostly splits his time between Princeton University, where he is a senior and a politics major, and Atlantic City, where he plays high-stakes poker in his black hooded sweatshirt and dark aviator shades.

Since September, he says, he has won \$120,000, including \$30,000 in Atlantic City and \$90,000 playing at [PartyPoker.com](http://PartyPoker.com), a popular online casino that says it is "licensed and regulated by the government of Gibraltar." Those claims are backed up by his financial records.

Mr. Sandberg's is an extreme example of a gambling revolution on the nation's college campuses. Mr. Sandberg calls it an explosion, one spurred by televised poker championships and a proliferation of Web sites that offer online poker games.

Experts say the evidence of gambling's popularity on campus is hard to miss. In December, for example, a sorority at Columbia held its first, 80-player poker tournament with a \$10 buy-in, a minimum amount required to play, while the University of North Carolina held its first tournament, a 175-player competition, in October. Both games filled up and had waiting lists. At the University of Pennsylvania, private games are advertised every night in a campus e-mail list.

"It's the TV programs that are driving it," said Elizabeth George, chief executive of the North American Training Institute, a nonprofit organization in Duluth, Minn., that specializes in the problems of pathological and underage gambling. "Young people particularly are drawn to it. There are superstars, then there's advertising, plus the Internet. So with all of those elements, put that into a bag and shake it up and what you have is a remarkably dangerous situation."

Last year, Elliott Dorsch of Tampa, Fla., another Princeton senior, made \$11,000 in two hours playing online blackjack, only to lose most of it in 15 minutes, he said.

"I was playing very recklessly," he said. "I was definitely very drunk."

Vik Bellapravalu, a Princeton junior from Phoenix, who plays poker with friends on campus, said, "Whatever amount you can think of, it's probably been lost or won."

Drastic gains and losses have always been a part of gambling, but access to poker games has never been

as easy as the Internet makes it, and undergraduates and students of youth gambling say that interest has never been so high.

Members of both groups point to ESPN's frequent broadcasts of the World Series of Poker as a catalyst. The series has made heroes out of everyman champions like Chris MoneyMaker, who started playing poker four years ago and won the \$2.5 million grand prize in the 2003 series after entering for \$40 through an online poker Web site.

Mr. Sandberg, from his narrow, atticlike room on the top floor of a Princeton dormitory, can spend up to 10 hours a day playing the game he loves most - Texas Hold'em, a popular version of poker that is simple to learn but hard to master.

With his well-worn baseball cap and bristly, blond goatee, Mr. Sandberg doesn't look like a high roller, and his slapdash dorm room, bedecked with poker posters, bears no marks of a conspicuous consumer.

Sitting on a folding chair in front of his laptop computer and looking almost bored, he plays three online games at once, each for many hundreds of dollars, while distractedly listening to classic rock and instant-messaging his friends. He speaks in poker parlance as if everyone understands it and can innately calculate the odds of drawing pocket aces (two, face down), while casually sizing up his online opponents and divining what cards they may hold.

Thanks to a boom in tournaments and prize money, poker has become a career option for Mr. Sandberg, he says. Though he is graduating in May, he has not applied to graduate school or for any jobs.

"I'm playing this game, treating it like a job," he said. He predicts that he could make up to half a million dollars a year, just playing on his computer every day. "Even with the bad runs," he said, "I haven't had a losing month or even too long of a losing session. I think I'm a pretty smart guy, and I'm only going to get better at cards."

Last summer, instead of getting a job, Mr. Sandberg set a goal of winning \$10,000 at PartyPoker, where, he said, he clicked and bluffed his way to his goal by the time he returned to school in September.

"My parents said I should do something useful, and I made \$10,000," he said. "I thought that was pretty useful."

His bank statement seems to support his claims, with a six-figure balance, large withdrawals for what he says were casino trips and even larger deposits from online winnings. His personal account on PartyPoker.com echoes his bank statement, with matching payments and deposits that are specifically for poker.

Mr. Sandberg credits his success to two simple principles: know the odds, and don't play more than you can lose. "It seems simple, but it's one of the biggest flaws of many poker players," he said.

His goal is to enter the high-stakes poker tours and compete with his heroes.

"I want to get to the point where I'm the best in the world and play against those guys on TV," he said. "I don't want to tell stories about playing with so-and-so once; I want to be doing it all the time."

While Mr. Sandberg insists that he is not a compulsive gambler, and he seems to bet large amounts only when the odds are heavily in his favor, some experts fear that college-age gamblers are swallowing the hype of big-stakes poker without coming to grips with the dangers of addiction.

"With gambling on TV, there's been lots of glamorization, but not much responsibility," said Keith S. Whyte, executive director of the National Council on Problem Gambling. He called the gambling opportunities "almost ubiquitous" for the college-age crowd. "The administrations don't do a good job of telling students how to get help," he said, "the same way they're sending the 'prevention and responsibility' messages for alcohol, substance abuse and date rape."

At the University of Pennsylvania, Dan Kline, the president of the poker society, says that everyone is playing poker.

"When we started this thing in 2002, about 10 people joined," said Mr. Kline, a junior. "Now when we have a tournament, we'll get 500 people responding in a half-hour to our e-mail."

A free tournament organized by the group last year attracted twice as many people as space would permit. This year's tournament, however, which offered \$2,000 in donated prize money, was canceled by uneasy administrators, who had also canceled a fraternity-organized charity poker tournament in November, fearing the legal implications of offering prizes for gambling.

Princeton has no explicit rules about gambling on campus, and has not taken steps to address it. "This is something we, the administration, need to sit down and decide if there should be a uniform policy about it," said Hilary Herbold, the associate dean in charge of disciplinary action at the university. She noted the formal policies devised amid concerns about file-sharing of copyrighted music in recent years.

Mrs. Herbold said problem gamblers were being dealt with case by case. The administration has broken up regular group games held in Princeton's eating clubs.

"What we're really primarily concerned about is the well-being of the students," she said. "Were I to discover that a student was gambling online, I would probably tell them to stop and give them a warning."

Mr. Whyte of the National Council on Problem Gambling says he is concerned that college-age gamblers, often susceptible to overwhelming stress and lacking a mature sense of money, are particularly susceptible.

"They're not going to lose their house if they don't win," he said. "Mom and Dad can still bail them out. It's just not as realistic a view of money as adults, and it's very hard to reach that age group. By the time they've gotten to college, they've already started gambling."

Mr. Sandberg says his parents in Alexandria are aware that he loves playing poker, but don't know that he spends almost every weekend in Atlantic City, or how much he has earned. His mother, he said, "thinks I just don't tell her about the times I lose."

He added, "She thinks I'm up and down, but I really do win almost every time I go."

Like video games and instant messaging, online poker has had its impact on academics. Mr. Sandberg said that he failed a midterm exam this fall because of his commitment to poker, and that he ranked in the bottom fifth of his class.

But, he says, "I'm not too concerned with what my G.P.A. is. You don't have to hand your résumé to the casino when you walk in or anything."

And even during final exams in January, Mr. Sandberg's poker hours did not diminish.

"It's tough to battle the mind-set of, 'I'm going to graduate, and this poker is pretty regular money,' " he said. "I don't think I can make \$120,000 doing anything but poker. I was half-studying for my politics exam today, but I got bored and started playing poker on my computer instead."

If the experts are correct, though, Mr. Sandberg might want to focus on that exam.

"Gambling is a game of chance," Mr. Whyte said. "Some people can make a living doing it, but even in the long run, most people regress to the mean and wind up with zero or close to it."

*Greg Winter contributed reporting for this article.*

**Chairman Traynor & members of the Senate Judiciary  
Committee**

**My name is Warren DeKrey, Chm. Of the ND Council on  
Gambling Problems**

**I appear in opposition to HCR 3035, which would amend the  
ND State constitution to require the legislative assembly to  
authorize the establishment of internet live poker  
establishments. This bill would put the State of ND in the  
business of regulating the off-shore internet poker sites that  
comes to ND.**

**Presently internet live poker sites are illegal in ND. The  
constitutional amendment, if approved, would make the  
provision legal, however these sites would still be illegal  
according to federal law.**

**The most recent Bismarck Tribune article of Saturday March  
12, 2005 lists 3 federal laws which apply to this bill, namely the  
"Wire act", the "Travel Act" and the "Anti Gambling Act".  
ND Attorney General Wayne Stenehjem quotes US Asst.  
Attorney General Laura Parsky as saying federal law  
"prohibits gambling over the Internet, including casino-style  
gambling."**

**AG Stenehjem is then quoted as saying "At one point or  
another, we are going to be, if this law is passed, in courts, in a  
very protracted and potentially expensive lawsuit to defend the  
statute," and further "Before I would be willing...to establish  
an internet gaming program in ND, I would have to have a  
ruling from a court indicating that in doing so, we're not  
violating [federal law]."**

**The above points out very clearly the position of the U.S. Dept. of Justice. Both Nevada and the US Virgin Islands have attempted action similar to HCR 3035 and because of federal law declined to pursue it further.**

**Because HCR 3035 is illegal according to federal law, it seems wise and prudent to defeat this bill and prevent any further expense which might occur if pursued further.**

**I urge a NO vote on HCR 3035**

**Below I have included my testimony given at the HCR 3035 hearing before the Constitutional Revisionist Committee and before your Judiciary Committee on HB 1509.**

**The real question is: why would off-shore poker want to come to ND and be regulated? When has gambling really wanted to be regulated?**

**For example, this session has seen charitable gambling asking for less and less regulation. Requests have been for raised bets, extended hours, 14-7, and more games. Previous sessions have been similar, and in addition, often requesting a higher percent of earnings for operations, which now are over 50%.**

**HCR 3035 just doesn't add up.**

**Would off-shore gambling be interested in the general good of ND and would they strive to improve ND? Lets be honest about all of this. They are interested in money and only money. Their only interest is in whatever will help them make more money.**

**The most recent federal study on gambling, the 1999 Gambling Impact Study Commission noted that in states heavily involved in gambling the gambling industry spent large amounts of**

money in various ways and lobbied extremely hard and very effectively for their own interests. The members of the Commission also agreed that there is a need for a "pause" in the growth of gambling.

The gambling industry is not interested in economic development. In fact gambling is reverse economic development, merely a redistribution of wealth, rather than a 3-5% multiplier expected in the business community.

HCR 3035 requires the legislative assembly to authorize the establishment of internet live poker establishments.

That is all that it specifies. We have just been through a similar situation in the Lottery Bill. We were told it was just the Power Ball. Now look at what we have: Power Ball, Hot Lotto and Wild Card 2. In addition the State has indicated plans to add 2 more games and maybe even 3.

Should HCR 3035 become a reality we can be absolutely sure that the next step will be to legalize electronic video gambling, or what is usually called slot machines.

High speed gambling machines – "Internet Gambling"- are the "crack cocaine" of gambling, very highly addictive. Youth are twice as likely to be addictive as adults.

America should not be exporting such an addictive and dangerous product to a world that is looking to us for better leadership.

What are we teaching our people, especially our youth, don't work, just gamble and you get rich.

ND needs to build its financial structure on a solid economic base. A good example is the Bank of ND. Another good example is the State Mill & Elevator. These ventures have been a source of pride to North Dakotans. Can we really have that sense of pride in a gambling venture?

**Gambling and crime have long been associated together. We have just seen a very good example in a horse racing lawsuit in Fargo. We are familiar with the**

**Susan Bala court case and the alleged participation by the Gambino crime family of New York. Susan Bala has been convicted in ND and both Gambino's and Bala have been indicted by a grand jury in NY awaiting trial according to recent newspaper accounts. This is a good example of major crime getting involved in gambling. The moral of the story is – crime likes to follow gambling and then finds a way to avoid taxes. This bill has the potential of getting ND in a lot of trouble we don't need.**

**Gov. Link testified at a committee hearing that “Gambling has an insatiable appetite that can never be satisfied”.**

**He also is quoted as saying “Are we so bankrupt in ND that we have to depend on the whims of people who wish to play gambling games”?**

**We have been hearing of huge financial gains for the State from internet poker, all based on gambling revenue from State supervision of internet poker. This may well be pie in the sky, certainly not a sound economic basis for sound government.**

**Is money everything – or is this just the lure of easy money, regardless of source – or greed?**

**An old adage says: If it sounds too good to be true – it usually is.**

**I urge a no vote on HCR 3035**

# LOUISIANA COURT RULING

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 01-30389

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In Re: MASTERCARD INTERNATIONAL INC. INTERNET GAMBLING LITIGATION

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LARRY THOMPSON, On behalf of himself and all others similarly  
situated,

Plaintiff-Appellant,

VERSUS

MASTERCARD INTERNATIONAL INC.; FLEET BANK, (RHODE ISLAND) N A;  
and FLEET CREDIT CARD SERVICES L P,

Defendants-Appellees.

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In Re: VISA INTERNATIONAL ASSOCIATION INTERNET GAMBLING  
LITIGATION

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LAWRENCE BRADLEY, On behalf of himself and all others similarly  
situated,

Plaintiff-Appellant,

VERSUS

VISA INTERNATIONAL SERVICE ASSOCIATION; TRAVELERS BANK USA CORP,

Defendants-Appellees.

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Appeal from the United States District Court

For the Eastern District of Louisiana

November 20, 2002

Before DeMOSS, STEWART, and DENNIS, Circuit Judges.

DENNIS, Circuit Judge:

In this lawsuit, Larry Thompson and Lawrence Bradley ("Thompson," "Bradley," or collectively "Plaintiffs") attempt to use the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, to avoid debts they incurred when they used their credit cards to purchase "chips" with which they gambled at on-line casinos and to recover for injuries they allegedly sustained by reason of the RICO violations of MasterCard International, Visa International, and banks that issue MasterCard and Visa credit cards (collectively "Defendants").<sup>1</sup> The district court granted the Defendants' motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. We AFFIRM.

I.

Thompson and Bradley allege that the Defendants, along with unnamed Internet casinos, created and operate a "worldwide gambling

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<sup>1</sup> Thirty-three virtually identical cases were transferred to the Eastern District of Louisiana through multidistrict litigation. Of these, the two on appeal were selected as test cases and consolidated for pre-trial purposes. See In re Mastercard Int'l Inc., Internet Gambling Litigation and Visa Int'l Internet Serv. Ass'n Internet Gambling Litigation, 132 F. Supp. 2d 468, 471 n.1 (E.D. La. 2001).

enterprise" that facilitates illegal gambling on the Internet through the use of credit cards. Internet gambling works as follows. A gambler directs his browser to a casino website. There he is informed that he will receive a gambling "credit" for each dollar he deposits and is instructed to enter his billing information. He can use a credit card to purchase the credits.<sup>2</sup> His credit card is subsequently charged for his purchase of the credits. Once he has purchased the credits, he may place wagers. Losses are debited from, and winnings credited to, his account. Any net winnings a gambler might accrue are not credited to his card but are paid by alternate mechanisms, such as wire transfers.

Under this arrangement, Thompson and Bradley contend, "[t]he availability of credit and the ability to gamble are inseparable."<sup>3</sup> The credit card companies facilitate the enterprise, they say, by authorizing the casinos to accept credit cards, by making credit available to gamblers, by encouraging the use of that credit through the placement of their logos on the websites, and by processing the "gambling debts" resulting from the extension of credit. The banks that issued the gamblers' credit cards participate in the enterprise, they say, by collecting those "gambling debts."

Thompson holds a MasterCard credit card issued by Fleet Bank

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<sup>2</sup> Gamblers can purchase the credits through online transactions or by authorizing a purchase via a telephone call. Gamblers also can purchase the credits via personal check or money order using the mails.

<sup>3</sup> The Plaintiffs state that 95% of Internet gambling business involves the use of credit cards.

(Rhode Island) NA. He used his credit card to purchase \$1510 in gambling credits at two Internet gambling sites. Bradley holds a Visa credit card issued by Travelers Bank USA Corporation. He used his credit card to purchase \$16,445 in gambling credits at seven Internet gambling sites. Thompson and Bradley each used his credits to place wagers. Thompson lost everything, and his subsequent credit card billing statements reflected purchases of \$1510 at the casinos. Bradley's winning percentage was higher, but he fared worse in the end. He states his monthly credit card billing statements included \$7048 in purchases at the casinos.

Thompson and Bradley filed class action complaints against the Defendants on behalf of themselves and others similarly situated. They state that the Defendants participated in and aided and abetted conduct that violated various federal and state criminal laws applicable to Internet gambling. Through their association with the Internet casinos, the Defendants allegedly "directed, guided, conducted, or participated, directly or indirectly, in the conduct of an enterprise through a pattern of racketeering and/or the unlawful collection of unlawful debt," in violation of 18 U.S.C. § 1962(c).<sup>4</sup> They seek damages under RICO's civil remedies provision,<sup>5</sup> claiming that they were injured by the Defendants' RICO

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<sup>4</sup> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c).

<sup>5</sup> 18 U.S.C. § 1964.

violations. They also seek declaratory judgment that their gambling debts are unenforceable because they are illegal.

Upon motions by the Defendants, the district court dismissed the Plaintiffs' complaints. In a thorough and careful opinion, the court determined that the Plaintiffs not only could not satisfy the necessary prerequisites to a RICO claim but also could not establish their standing to bring such a claim. The Plaintiffs now appeal.

## II.

We review a district court's grant of a Rule 12(b)(6) motion de novo, applying the same standard used below.<sup>6</sup> "In so doing, we accept the facts alleged in the complaint as true and construe the allegations in the light most favorable to the plaintiffs."<sup>7</sup> But "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."<sup>8</sup>

## III.

All RICO violations under 18 U.S.C. § 1962 entail "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of

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<sup>6</sup> Nolen v. Nucentrix Broadband Networks, Inc., 293 F.3d 926, 928 (5th Cir. 2002); see also Rubinstein v. Collins, 20 F.3d 160, 166 (5th Cir. 1994) ("Such dismissals may be upheld only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." (internal quotation and citation omitted)).

<sup>7</sup> Nolen, 293 F.3d at 928 (citing Rubinstein, 20 F.3d at 166).

<sup>8</sup> Id. (citing Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir. 1993)).

an enterprise."<sup>9</sup> As to the second element, a RICO plaintiff may show that the defendant engaged in the collection of unlawful debt as an alternative to showing the defendant engaged in a pattern or racketeering activity.<sup>10</sup> A RICO claim alleging a violation of § 1962(c), as here, also requires that the defendant "participate[d] in the operation or management of the enterprise itself."<sup>11</sup> Of these required elements, the district court concluded that Thompson and Bradley failed to plead facts showing a pattern of racketeering activity or the collection of unlawful debt; a RICO enterprise; or participation in the operation or management of the enterprise. We agree that the Plaintiffs' allegations do not show a pattern of racketeering activity or the collection of unlawful debt. Because this conclusion, alone, is dispositive, we need not consider whether the Plaintiffs sufficiently alleged the other elements.

"A pattern of racketeering activity requires two or more predicate acts and a demonstration that the racketeering predicates are related and amount to or pose a threat of continued criminal activity."<sup>12</sup> The predicate acts can be either state or federal

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<sup>9</sup> Crowe v. Henry, 43 F.3d 198, 204 (5th Cir. 1995) (citing Delta Truck & Tractor, Inc. v. J. I. Case Co., 855 F.2d 241, 242 (5th Cir. 1988)).

<sup>10</sup> 18 U.S.C. § 1962(a)-(c); see also Nolen, 293 F.3d at 928-29.

<sup>11</sup> Reves v. Ernst & Young, 507 U.S. 170, 185 (1993).

<sup>12</sup> St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 441 (5th Cir. 2000) (citing Word of Faith World Outreach Ctr. Church, Inc. v. Sawyer, 90 F.3d 118, 122 (5th Cir. 1996)).

crimes.<sup>13</sup> Thompson and Bradley allege both types of predicate acts.

On appeal, Thompson alleges that the Defendants' conduct violated a Kansas statute that criminalizes five types of commercial gambling activity.<sup>14</sup> Only two sections of the statute—sections (c) and (e)—are even remotely relevant here. Neither implicates the Defendants' conduct. Because the Defendants completed their transaction with the Plaintiffs before any gambling occurred, that transaction cannot have involved taking custody of something bet or collecting the proceeds of a gambling device. Both of those activities, which constitute commercial gambling under Kansas law, necessarily "can only take place after some form of gambling [has been] completed."<sup>15</sup> Accordingly, we find that Thompson fails to identify a RICO predicate act under Kansas law.<sup>16</sup>

Bradley alleges on appeal that the Defendants' conduct violated a New Hampshire gambling statute aimed at persons who

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<sup>13</sup> 18 U.S.C. § 1961(1).

<sup>14</sup> Kan. Stat. Ann. § 21-4304. This statute, which states that commercial gambling is a "level 8, nonperson felony," defines commercial gambling as: "(a) Operating or receiving all or part of the earnings of a gambling place; (b) Receiving, recording, or forwarding bets or offers to bet or, with intent to receive, record, or forward bets or offers to bet, possessing facilities to do so; (c) For gain, becoming a custodian of anything of value bet or offered to be bet; (d) Conducting a lottery, or with intent to conduct a lottery possessing facilities to do so; or (e) Setting up for use or collecting the proceeds of any gambling device."

<sup>15</sup> See In re Mastercard, 132 F. Supp. 2d at 479.

<sup>16</sup> Thompson has abandoned his reliance on three other violations of Kansas law he alleged below. Violations of those statutes cannot serve as predicates because they identify only misdemeanor offenses. See 18 U.S.C. § 1961(1)(A).

operate or control places where gambling occurs.<sup>17</sup> Bradley did not, however, allege a violation of the statute in his complaint. In any event, this statute is patently inapplicable to the Defendants under the facts alleged. Indeed, Bradley makes no effort in his briefs to explain its applicability. Accordingly, we find that Bradley, too, fails to identify a RICO predicate act under a state criminal law.<sup>18</sup>

Thompson and Bradley both identify three substantive federal crimes as predicates—violation of the Wire Act, mail fraud, and wire fraud.<sup>19</sup> The district court concluded that the Wire Act concerns gambling on sporting events or contests and that the Plaintiffs had failed to allege that they had engaged in internet sports gambling.<sup>20</sup> We agree with the district court's statutory interpretation, its reading of the relevant case law, its summary of the relevant legislative history, and its conclusion. The Plaintiffs may not rely on the Wire Act as a predicate offense

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<sup>17</sup> N.H. Rev. Stat. Ann. § 647:2(I-a)(b). This statute provides that "[a] person is guilty of a class B felony if such person conducts, finances, manages, supervises, directs, or owns all or part of a business and such person knowingly and unlawfully conducts, finances, manages, supervises, or directs any gambling activity on the business premises . . . ."

<sup>18</sup> Bradley has abandoned his previous reliance on various New Hampshire civil statutes, each of which was obviously inadequate to identify a predicate crime under 18 U.S.C. § 1961(1)(A).

<sup>19</sup> 18 U.S.C. §§ 1084, 1341, 1343.

<sup>20</sup> In re Mastercard, 132 F. Supp. 2d at 480 ("[A] plain reading of the statutory language [of the Wire Act] clearly requires that the object of the gambling be a sporting event or contest.").

here.<sup>21</sup>

The district court next articulated several reasons why the Plaintiffs may not rely on federal mail or wire fraud as predicates.<sup>22</sup> Of these reasons, two are particularly compelling. First, Thompson and Bradley cannot show that the Defendants made a false or fraudulent misrepresentation.<sup>23</sup> Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal. Hence, the Defendants could not have fraudulently represented the Plaintiffs' related debt as legal because it was, in fact, legal. We agree that "the allegations that the issuing banks represented the credit charges as legal debts is not a scheme to defraud."<sup>24</sup> Second, Thompson and Bradley fail to allege that they relied upon the Defendants' representations in deciding to gamble.<sup>25</sup> The district court correctly stated that although reliance is not an element of statutory mail or wire fraud, we have required its showing when

<sup>21</sup> Bradley criticizes the district court for ignoring his identification of an Internet site named "Sportsbook" in his complaint. The name of the site is irrelevant, for Bradley nowhere alleges that he gambled on sporting events or contests at that or any other site.

<sup>22</sup> Id. at 481-83.

<sup>23</sup> See In re Burzynski, 989 F.2d 733, 742 (5th Cir. 1993) (stating that an element of a RICO mail fraud claim is "a scheme to defraud by means of false or fraudulent representation").

<sup>24</sup> In re Mastercard, 132 F. Supp. 2d at 482.

<sup>25</sup> Based in part on this same failure, the district court correctly determined that the Plaintiffs could not establish standing to sue under 18 U.S.C. § 1964(c). See id. at 495-96 (explaining that standing requires a showing of both factual and proximate causation).

WIRE ACT  
COURT  
RESULTS

mail or wire fraud is alleged as a RICO predicate.<sup>26</sup> Accordingly, we conclude that Thompson and Bradley cannot rely on the federal mail or wire fraud statutes to show RICO predicate acts.<sup>27</sup>

In the alternative, Thompson and Bradley allege that the Defendants engaged in the collection of unlawful debt. Under § 1961, a RICO plaintiff may attempt to show that the debt is unlawful because it was incurred or contracted in an illegal gambling activity or in connection with the illegal business of gambling or because it is unenforceable under usury laws or was incurred in connection with the business of lending at usurious rates.<sup>28</sup> Neither Thompson nor Bradley raise the specter of usury. And, as we have already found, the Defendants' conduct did not involve any violation of a state or federal gambling law. Thus, we agree with the district court's conclusion that the Plaintiffs have not sufficiently alleged "the collection of unlawful debt."<sup>29</sup>

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<sup>26</sup> Summit Props., Inc. v. Hoechst Celanese Corp., 214 F.3d 556, 562 (5th Cir. 2000) (stating that the element of reliance is required to recover damages in a RICO fraud claim); see also In re Mastercard, 132 F. Supp. 2d at 482, 496 (explaining that the element of reliance is also key to the issue of standing).

<sup>27</sup> Because we find neither the Wire Act nor the mail and wire fraud statutes may serve as predicates here, we need not consider the other federal statutes identified by the Plaintiffs: § 1952 (Travel Act); § 1955 (illegal gambling businesses); and § 1957 (money laundering). As the district court correctly explained, these sections may not serve as predicates here because the Defendants did not violate any applicable federal or state law. See In re Mastercard, 132 F. Supp. 2d at 482-83 & n.6. The Plaintiffs' reliance on § 1960 fails because it is not an authorized RICO predicate under § 1961(1)(B).

<sup>28</sup> 18 U.S.C. § 1961(6).

<sup>29</sup> In re Mastercard, 132 F. Supp. 2d at 483.

Because Thompson and Bradley cannot prove a necessary element of a civil RICO claim, namely that the Defendants engaged in a pattern of racketeering activity or the collection of unlawful debt, we hold that dismissal is proper under Rule 12(b)(6).<sup>30</sup>

Finally, we reiterate the district court's statement that "RICO, no matter how liberally construed, is not intended to provide a remedy to this class of plaintiff."<sup>31</sup> Thompson and Bradley simply are not victims under the facts of these cases. Rather, as the district court wrote, "they are independent actors who made a knowing and voluntary choice to engage in a course of conduct."<sup>32</sup> In engaging in this conduct, they got exactly what they bargained for—gambling "chips" with which they could place wagers. They cannot use RICO to avoid meeting obligations they voluntarily took on.

#### IV.

For the foregoing reasons, we AFFIRM the judgment of the district court.

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<sup>30</sup> We need not analyze the validity or merit of Plaintiffs' claim based on aiding and abetting liability because (assuming it is valid) it necessarily falls along with the underlying RICO claim. Likewise, we need not consider the merits of the Defendants' motions to join the Internet casinos pursuant to Rule 19 of the Federal Rules of Civil Procedure. We agree with the district court that those motions are moot.

<sup>31</sup> Id. at 497.

<sup>32</sup> Id.

Att #2



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Wayne Stenehjem  
ATTORNEY GENERAL

MEMORANDUM

To: Senator Traynor, Chairman, Senate Judiciary Committee  
From: Kathy <sup>Roll</sup> Roll, Office of Attorney General, Financial Administrator  
Re: House Bill No 1509 Fiscal Estimate

Date: March 18, 2005

The revised Office of Attorney General cost estimate for implementation of this bill and regulation of the industry, based on the amendments the Senate Judiciary Committee is considering (50295.0405), is \$998,377 for the 2005-07 biennium and \$588,804 for the 2007-09 biennium. The higher cost in the 2005-07 biennium results from the need for a specialized computer system to regulate the industry. In addition, a \$200,000 contingency is provided for unforeseen costs associated with the requirements of this legislation for each biennium.

When we met with some of the Internet Live Poker industry representatives regarding the costs associated with the state's implementation and regulation, one industry representative estimated the cost at \$500,000 - \$1,000,000 per year. All of the industry representatives present agreed the cost of this implementation and regulation is paid by the industry. As you are aware, the Senate amendments require \$1,000,000 to be deposited in the Attorney General Internet Live Poker Implementation and Operating Fund prior to the effective date of the bill and prior to any expenditures being made from the fund.

Each site would be required to pay a gaming testing vendor for all costs of testing their computer system, including those costs associated with on-site inspections. Indian gaming casinos are also required to follow this practice.

The Senate Judiciary amendments require \$25,000 per quarter from Internet Live Poker proceeds to be deposited into the Compulsive Gambling Treatment and Prevention Fund. For the 2005-07 biennium, this could result in \$100,000 being transferred to this fund and \$200,000 being transferred to this fund for the 2007-09 biennium.

Since information on which to base the estimated revenue from this industry is unavailable, we are unable to provide an estimate for any revenue this bill could generate for property tax relief, for the amount the 5% surcharge on adjusted gross proceeds of each establishment would provide for the Attorney General Legal Defense Fund, or for the license and user fees required in the amendments.